VISION 360

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A TREASURY OF KEY TAX & REGULATORY DEVELOPMENTS!

TCA TAXCRAFT ADVISORS

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EDITORIAL

VISION 360 – Fourth Anniversary of GST and way forward!

July 01, 2021 marks four years of implementing Goods and Services Tax and on this occasion the Hon'ble Finance Minister rekindled the gigantic scale of efforts required to implement this tax reform. The FM was astute in pointing that "For eight months in a row, Goods and Services Tax (GST) revenues have crossed INR 1 lakh crore mark and touched a record INR 1.41 lakh crore in April 2021" and that the enhanced GST mop up in the recent months should now be the "new normal".

Without a doubt, efforts that went into this reform in a country with diversity of its own kind are commendable, but these would be worthier of appreciation if the tax reform delivered the growth that it promised. An objective assessment to figure the benefits of GST would be comparing GDP, tax revenue, etc. from pre-GST era to present, yet we saw no iota of such comparative analysis in last four years.

GST was also expected to curb mal-practices and bring state of the art compliance mechanism. Failure on this agenda is clear from GST portals inability top provide for GSTR 2/GSTR 3 and the fact that the enforcement drive launched by Central Board of Indirect Taxes and Customs since November 2020 has resulted in detecting cases of fake ITC (input tax credit) and evasion of GST of more than INR 29,000 crore till now.

While compliance burden may seem to have reduced to a great extent given that many Central and State levies are subsumed into one also creating roping in for One Nation – One Tax, the technical glitch of the GST portal, continues to put taxpayers into practical difficulties time and again.

Despite all these challenges, all is not gloomy. Removal of cascading effect - objectively speaking - has been one of the biggest achievements. Many industry speakers admit the supply chain to be free from tax inflation. The 44 meetings of GST council that represents Central and State Governments together have taken some noteworthy decision to let the GST settle for good.

It is now to be seen when this council expands the GST net to cover Petrol-Diesel. This will not only reduce the inflation caused by tax cost on fuel but will also stand a testament to Government's resolve of ensuring ease of doing businesses!

On Direct tax front the Government has now increased the fold of TDS from service sector to also include goods. Now buyer of goods is responsible to also ensure compliance with TDS mechanism. While it may sound simplicitor but it does pose some serios practical challenges in that the failure to follow TDS mechanism by a purchaser put the seller to deposit the tax with exchequer through TCS! This requires the taxpayers to monitor sale-purchase of goods even more rigorously. The new provisions also requires the taxpayers to identify defaulters and deduct tax at a higher percentage. In all the mechanism leads to higher compliance measures to ensures enforcement of law which is essentially Government responsibility per se.

On the regulatory front MCA has provided much awaited respite from physical meetings in many cases. Especially in current situation where companies are forced to hold board meetings to accept their annual financial statements. It became more and more difficult to conduct physical meetings in view of on-going situation of Covid-19 as well as restrictions on overseas travel. The relaxation by MCA now allows the board to convene through Video Conferencing.

On International trade front, the Bureau of Indian Standards has also provided extension to its much-awaited various Quality Control Order that required quality certification for import of leather footwear, rubber footwear and personal protective equipment. The Order was to come into effect from July 01, 2021. The operation of these Order is now extended by 6 – 12 months depending on the article. The extension is announced amidst difficulties in overseas travel.

Steering through these phases, we all keep facing ups and downs, yet what matters the most is we keep going on. With yet another issue of **VISION 360**, we, the entire team of **TIOL**, in association with **Taxcraft Advisors LLP**, **GST Legal Services LLP** and **VMG & Associates**, look forward to aid you with key tax and regulatory updates!

Happy Reading!

P.S.: This document is designed to begin with an article peeking into a recent tax/regulatory issue followed by stimulating perspective of a leading industry professional. It then goes on to bring to you latest key developments, judicial and legislative, from Direct tax, Indirect tax and Regulatory space. Don't forget to check out our international desk and sparkle zone for some global and local trivia.

CONTENTS

ARTICLE

ARTICLE: PLI SCHEMES IN INDIA – A BILLION DOLLAR PLAN! — 05

In this article, the authors deliberate the vitality of PLI schemes to make India a major manufacturing hub while explaining the various aspects such as industries covered under these schemes, incentives extended, eligibility criteria and so on. It also deliberates viability of the scheme and practical nuances

INDUSTRY PERSPECTIVE

MR. SUNIL KUMAR - DIRECTOR-FINANCE, SENSIENT INDIA PVT. LTD. — 07

Mr. Kumar shares his thoughts and perspective on recent amendments to export benefits while discussing the challenges faced by import-export community. Also deliberates on faceless assessment and impact of TDS on sale of goods

DIRECT TAX - FROM THE JUDICIARY

- ITAT holds that benefit derived from sale of additional FSI, a wind fall gain by operation of law, to be a non-taxable capital receipt — 09
- ITAT allows write-off of investment in 'overseas loss-incurring subsidiaries' as business loss — 11
- ITAT allows deduction of Corporate Marks Fee paid to German AE on 'crystallization of liability' — 12

...and other judicial developments from June 2021

TRANSFER PRICING - FROM THE JUDICIARY

- ITAT deletes AMP-adjustment made on substantive and protective basis for non-existence of international-transaction — 13
- ITAT upholds combined accounts approach for ALP-determination — 13

...and other judicial developments from June 2021

DIRECT TAX - FROM THE LEGISLATURE

- CBDT notifies cost inflation index for FY 2021-22 — 16
- CBDT extends last date of payment under Direct Tax Vivad Se Vishwas Act, 2020, to Oct 31, 2021 — 17
- Directorate (Systems) notifies procedure for Compliance Check on Section 206AB/206CCA — 18

...and other Notifications, Circular, Trade Notice, etc. issued in June 2021

INDIRECT TAX - FROM THE JUDICIARY

- Madras HC holds loss of inputs during manufacturing process to be — 20
- Madras HC allows revision of TRAN-1 in absence of evidence of technical glitches — 20
- Chandigarh Tribunal allows refund of unutilized cesses lying in account on 01 July 2017 — 21

. . . and other judicial developments from June 2021

INDIRECT TAX - FROM THE LEGISLATURE

- GST liability arises on date of OC or first occupation, whichever is earlier — 31
- ITC eligibility on apartments supplied by landowner-promoter — 31
- CBIC clarifies on applicability of Dynamic QR Code on B2C Invoices — 31

...and other Notifications, Circular, Trade Notice, etc. issued in June 2021

CONTENTS

CUSTOMS & TRADE LAWS - FROM THE JUDICIARY

- CESTAT holds goods sold in DTA similar to those exported; quashes Department's contention of wrongful availment of exemption benefit 33
- HC directs CESTAT to await decision of SC, quashes CESTAT order remanding matter to adjudication authority 34

...and other judicial developments from June 2021

CUSTOMS & TRADE LAWS - FROM THE LEGISLATURE

- Anti-dumping duty on 'Cold-Rolled flat products of alloy or non-alloy steel' extended till December 15, 2021 35
- Amendment in export policy of Remdesivir and Remdesivir API 35

...and other Notifications, Circular, Trade Notice, etc. issued in June 2021

REGULATORY - FROM THE JUDICIARY

- HC quashes arbitral-award requiring BCCI to pay about INR 4,800 Cr. to Deccan Chargers for IPL Agreement-termination, imposes INR 10 Lacs as cost on Deccan Chargers 36
- SC dismisses appeal seeking stay on Devas Multimedia's liquidation proceedings 37
- SC held proceedings under Section 34 of Arbitration Act not maintainable against foreign award 37

...and other judicial developments from June 2021

REGULATORY - FROM THE LEGISLATURE

- SEBI relaxes minimum vesting period for ESOPs in event of death 39
- Board meetings to convene through virtual mode regularly 41
- SEBI Introduces New Delisting of Equity Shares Regulation 42

...and other Notifications, Circular, Trade Notice, etc. issued in June 2021

INTERNATIONAL DESK

With numerous modifications and amendments happening in the field of taxation across the globe, the authors shed light on few of the relevant and interesting recent global tax updates 44

SPARKLE ZONE

BOMBAY HC'S DEADLOCK ON INTERMEDIARY SERVICES 45

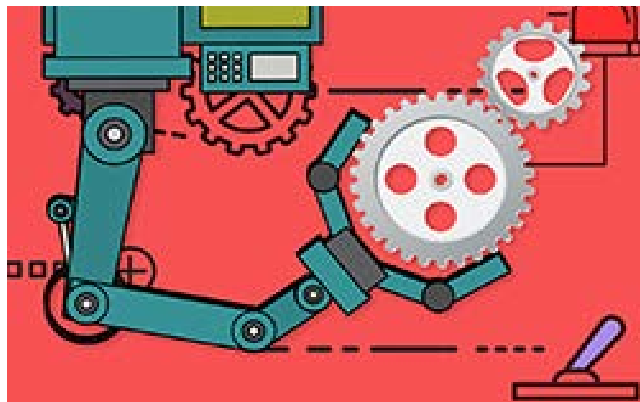
This special piece pertains to the Bombay HC's deadlock on Intermediary Service provisions. The authors explain the background, relevant provisions under GST Law and the detailed observations from both the judges along with their own analysis

PLI Schemes in India – A Billion Dollar Plan!

"A*apda mein hamne aage badhne ka awsar khoja*", the Hon'ble PM Mr. Narendra Modi stated in an event, remembering how the State Govt. overturned the fate of Gujarat from the horrors of the earthquake in 2001. Time and again, the PM has emphasized the importance of the principle of turning adversity into opportunity, especially in the current times.

Following the same principle of aapda ko awsar me badalna, in the midst of the global pandemic, coupled with the geo-political tensions between India and China, the Government introduced the Product Linked Incentive ('PLI') Scheme to give the economy a much-needed boost and to reduce India's dependence of Chinese products.

The Hon'ble Union FM in her budget speech on February 1, 2021 had announced an outlay of INR 1.97 Lakhs Crores for the PLI Schemes for 13 key sectors, to create national manufacturing champions and generate employment opportunities for the country's youth. This means that minimum production in India as a result of PLI Schemes is expected to be over US$ 500 billion in 5 years. The said scheme aims to provide incentives to companies on incremental sales from products manufactured in domestic units.



While inviting foreign companies to set up business in India, the scheme also aims to encourage domestic companies to set up or expand existing manufacturing units and also to generate more employment and cut down reliance on imports from other countries. The key objectives of the PLI scheme can be categorized as hereunder:

- Target specific product areas;
- To introduce non-tariff measures in order to compete more effectively with cheap imports;
- Blend domestic and export sales to make manufacturing competitive and sustainable;
- Promote manufacturing at home while encouraging investment from within and outside India.

Industries Targeted

While the scheme modestly began with certain electronic products, such as mobile phones, in April 2020, the same has now expanded to 10 varied sectors. The PLI scheme has been extended to electronic or technology products, pharmaceutical drugs, food processing, high-efficiency solar PV modules, telecom and networking products, automobiles and auto components, advance chemistry cell batteries, textile goods, steel goods and white goods. A Govt. official had recorded a statement that *"The PLI scheme across these 10 key specific sectors will make Indian manufacturers globally competitive, attract investment in the areas of core competency and cutting-edge technology, ensure efficiencies, create economies of scale, enhance exports, and make India an integral part of the global supply chain."*

Incentive under the Scheme

The PLI Scheme will provide an incentive of 4% to 6% on incremental sales, over base year i.e., 2019-20, of goods manufactured in India and covered under target segments, to eligible companies, for a period of 5 years subsequent to the base year.

Eligibility under the Scheme

Companies involved in manufacturing of goods covered under the target segments of the scheme and being registered in India, can apply under the PLI Scheme. The eligibility is subject to thresholds of Incremental Investment over the defined base year.

Under these schemes, the Applicants are required to meet the threshold criteria (incremental investment) of a minimum of INR 10 crores, in case of MSMEs or INR 100 crores in others cases, and a maximum of INR 1000 crores

to be eligible for disbursement of incentive for a prescribed year. In order to achieve or meet the threshold criteria of Incremental Investment for a particular year, the cumulative value of investment done till such year, including the year under consideration, over the Base Year of 2019-20, shall be considered.

The scheme further provides that any additional expenditure incurred by companies on plant, machinery, equipment, research and development and transfer of technology for manufacture in the target segments, shall be eligible for the incentive scheme.

Major Feats achieved under PLI Schemes so far!

As stated above, the PLI scheme began with the objective of increasing the investment in the electronics industry of the Country. Under the maiden MeitY - Mobile Manufacturing and Specified Electronic Components PLI Scheme, in the first 5 months of scheme operation and despite challenging times, the applicant companies had produced goods worth INR 35,000/- crores and invested INR 1,300/- crores under the scheme. Additional employment generation during this period stands at around 22,000 jobs.

Even though the response to the MeITY PLI Scheme has been commendable, there is a long way to go to achieve the target of minimum production of US$ 500 billion in 5 years. Currently, out of the 10 PLI Schemes targeted by the Govt., 6 are notified and the remaining 4 are in the process of obtaining approval by the Cabinet. The budget, quantum of benefit and the current status of each Industry / Sector has been tabulated hereunder:

Industry	Budget (US$ Billion)	Quantum of Incentive	Current Status - Cabinet
Electronics and Technology Project	1	1%-4%	Approved
Automobiles and Auto components	7.6	Awaited	Awaited
Telecom and networking equipment	1.6	4%-7%	Approved
Textile Sector	1.4	Awaited	Awaited
Advance Chemistry Cell Battery	2.4	Awaited	Awaited
Food Processing	1.5	4%-10%	Approved
Pharmaceutical Drugs	2	3%-10% (Category wise)	Approved
High Efficiency photovoltaic modules	0.6	Awaited	Approved
White Goods	0.8	4%-6%	Approved
Steel Goods	0.8	Awaited	Awaited

Authors' Note:

Going by the rousing response to the 1st PLI Scheme, it seems that the target of US$ 500 billion will be achieved with ease in 5 years' time. However, the delay (if any) in implementation of the schemes in entirety may also delay the ripe benefits. Accordingly, the Government should speed-up the process of granting scheme approvals and issuing road-maps for applications and disbursements of benefits.

As for the investors, it would be pertinent to note that as the PLI schemes are designed on a direct correlation between the incentives and upscaling of manufacturing capacities, which is at the core of this initiative, they shall begin to evaluate their eligibility for the approved schemes and avail the benefits.

It would further be pertinent to note that the unlike the previous inventive schemes such as MEIS, SEIS, EOU, the PLI Scheme is WTO compliant. Therefore, any issue qua the vires of the Scheme is unlikely. Therefore, it can be contemplated that these PLI Schemes could certainly bring India into the forefront of the investment hub!

Sunil Kumar

Director - Finance,
Sensient India Pvt. Ltd.

Mr. Kumar shares his thoughts and perspective on recent amendments to export benefits while discussing the challenges being faced by import-export community. He also deliberates on faceless assessment and impact of TDS on sale of goods...

Post the WTO fiasco in 2018, the Government has introduced the RoDTEP Scheme as a replacement to the MEIS Scheme. However, the RoDTEP Scheme itself has been running into trouble with delays and many ambiguities. Do you feel it has been able to meet the expectation of the exporters across the industry?

The MEIS Scheme was indeed quite beneficial to the exporters in India. It was quite a setback when the Indian Government discontinued MEIS post WTO fiasco. When the RoDTEP Scheme was announced, given the background and reasons for introducing the RoDTEP Scheme, the exporters were well aware about the fact that the incentives would not be as beneficial as MEIS. Accordingly, the expected benefits under the Scheme and ambiguities surrounding it cannot be called as a complete shocker.

Otherwise also, the scheme has been substantially delayed. During the implementation of the scheme in January 2021, the Ministry of Finance had said that it would shortly notify the details of export goods eligible for the scheme, the applicable RoDTEP rate, value caps, wherever applicable on such eligible goods, other conditions and restrictions along with the procedural details for grant of RoDTEP duty credit, and utilisation. However, to this day, the rates are yet to be finalized and notified. Recently, the FIEO said that the federation is expecting rates to be notified very shortly. Accordingly, we are hopeful the Government would expedite the finalization of the rates under the scheme and implement the same on ASAP basis.

Simultaneously, I believe that the kind of thrust placed on Make in India Scheme and India becoming a potential replacement to China as a global manufacturing hub, the Government must focus on incentivising the domestic production as well. This would not only reduce the dependency of manufacturers on export incentives, rather would push for the focus on qualitative and cost effective manufacturing of goods intended for exports.

Being a Company engaged in regular import-export of goods, what are the major challenges faced by your Company or industry as a whole?

Well, various issue pertinent to imports and exports have persisted ever since the international trade was systemised. In our industry, consisting mainly of food colouring & flavouring items, issues mainly relates to the classification and product certification such as FSSAI and FDA approvals. The classification issues mostly relates to whether the goods can be classifiable as Synthetic, Organic, Natural and Natural identical or not.

Further, food flavouring items being perishable, are required be cleared from the Customs port in the shortest possible time, depending upon the self-life of the product. When the consignment is held up for want of various clarifications, specially delays owing to the FSSAI and FDA Approval, it becomes difficult for us to not only stick to our customer deliverables, but also to bear the loss of goods, if the underlaying product imported is of short self-life or perishable in nature. We expect the Government to bring more automation and reduce the lead time required for product certification approvals leading to faster clearances of the consignments.

Recently, the Government has been revamping a number of procedural customs laws, most notably, a faceless assessment scheme for customs clearance had been announced. How has these measures been helpful in reducing the procedural requirements?

Not really! Although I completely understand that the faceless assessment scheme was introduced to minimise the human intervention and provide speedier Customs clearances through efficient utilisation of manpower, the scheme is still riddled with many issues. As the goods are assessed without any physical interference, many of the times the query raised by the Customs officials displays the lack of product understanding and various regulations surrounding the products, specially related to our industry.

In order get to clarifications, the Customs authorities intercept the imports for trivial issues, which hold up the clearance process indefinitely. This results into importers incurring heft demurrage charges. Though the scheme has lot of potential, but the authorities implementing the same and assessing the transaction on faceless mode, needs to better equipped with training and technical understanding of the subject.

SIMULTANEOUSLY, I BELIEVE THAT THE KIND OF THRUST PLACED ON MAKE IN INDIA SCHEME AND INDIA BECOMING A POTENTIAL REPLACEMENT TO CHINA AS A GLOBAL MANUFACTURING HUB, THE GOVERNMENT MUST FOCUS ON INCENTIVISING THE DOMESTIC PRODUCTION AS WELL. THIS WOULD NOT ONLY REDUCE THE DEPENDENCY OF MANUFACTURERS ON EXPORT INCENTIVES, RATHER WOULD PUSH FOR THE FOCUS ON QUALITATIVE AND COST EFFECTIVE MANUFACTURING OF GOODS INTENDED FOR EXPORTS.

The Finance Act 2021 has introduced a new provision in the Income Tax Act in the form of Section 194Q which requires the specified buyer to deduct TDS on the purchase of goods from the resident seller. Will this new provision impact your bottom line?

The new provision which has been made effective from July 2021 essentially overrides the TCS provision Section 206C(1H), which had also been just introduced last year. In the existing Section 206C(1H), a seller having threshold turnover, is required to collect from the buyer. This provision was made effective from 01 October 2020.

This had already created a lot of ambiguities as it was made applicable during the mid of the year. On top of this, the Govt. has now introduced Section 194Q, in the name of resolving the ambiguities as created by Section 206C(1H), which in essence doubled up the issues. Accordingly, it seems that a clarification is due from the Government in this regard before determining its impact on the business.

How has been your Company or industry coping with the Pandemic and plans to recover from the down turn?

Of course! the pandemic has not left any company or industry untouched. During the first wave, just like everyone else, we were not prepared for such an unprecedented event. Accordingly, the travel restriction had substantially impacted our business. However, being a Company engaged in food colouring and food processing, we were identified as an 'essential service provider'. Therefore, our business had never completely come to a halt.

As for the second wave, we were much better prepared. This time around, we have been able run our business rather swiftly. Accordingly, I can say that we have not faced the wrath of the pandemic completely, as being one of the lucky ones! With the diminishing effect of the second wave, we are quite optimistic about the momentum pick up from the last month and expect to resume the normal operations.

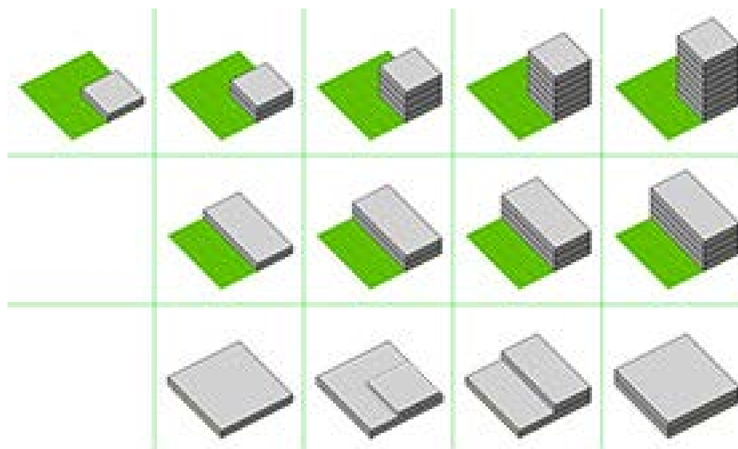
__Note:__ The views/opinions expressed in this section are those of the Author and do not necessarily reflect the views/opinions of the organization and/or the Publishers.

ITAT holds that benefit derived from sale of additional FSI, a wind fall gain by operation of law, to be a non-taxable capital receipt

Batliboi Limited
2021-TIOL-968-ITAT-MUM

The Assessee was a manufacturer of machine tools, textile machines, air conditioning. It was also engaged in refrigeration work, casting and job work for air conditioning, among others. It owned a constructed building on a plot of land in the city of Coimbatore which it proposed to sell along with its super structure and therefore entered into negotiations with several parties.

During the negotiations, the Assessee observed that post acquisition of the land and the constructed building, the Development Control Regulations in the city of Coimbatore had undergone a change and the Assessee had obtained an additional benefit of 0.8 by way of additional FSI. The purchasers agreed on INR 4.76 Crores for the additional FSI.



While filing the return of income, the Assessee excluded the sum of INR 4.76 Crores received towards additional FSI from its total income computed under normal provisions of the IT Act, treating it as a capital receipt. However, while computing its book profit under Section 115JB, the said sum was included.

The AO brought the said sum under the head 'transfer of FSI' to tax under long term capital gain as well as included it as part of working results of the Assessee under Section 115JB.

Aggrieved, the Assessee approached the CIT(A) which upheld the AO's action by inter-alia observing that the additional FSI had been sold along with the land and building within a single deal to a single purchaser and not separately as TDR.

Aggrieved, the Assessee filed an appeal before ITAT which directing the Revenue to exclude the sum of INR 4.76 Crores received towards additional FSI from taxable income under normal provisions of the IT Act, observed that it was only pursuant to the change in Development Control Regulations in the city of Coimbatore that the Assessee got vested with additional benefit of 0.8 by way of additional FSI. The Assessee could not have pre-empted any change in the Development Control Regulations at the time of purchase or before the sale and no cost was incurred by the Assessee for getting such benefit by way of additional FSI and therefore the additional benefit derived by the Assessee was only a wind fall gain by operation of law which could not be exigible for long term capital gains.

Further, observing that the additional sum of INR 4.76 Crores received by the Assessee towards additional FSI was indeed a capital receipt and it did not form part of operational working results of the Assessee, ITAT, directed the exclusion of additional sum while computing book profits under Section 115JB. The ITAT further held that, merely on the ground that a particular receipt, which is in the capital field, had been offered to tax by the Assessee voluntarily in the return of income while computing book profits under Section 115JB of the Act, it could not be brought to tax net.

ITAT holds sales, marketing services rendered abroad by NR-agent not FTS, thus, not liable to TDS

Prime Oceanic Pvt. Ltd.
2021-TII-104-ITAT-JAIPUR-INTL

The Assessee was a commission agent providing shipping services to its clients at various ports located all over world and had availed sales and marketing services of a UAE based company.

The Assessee submitted that such sales and promotion expenses were made for procuring the business outside India for which no technical services were required or rendered and as the UAE company's income was not chargeable to tax in India, payment of sale promotion expenses to the UAE company was not subject to tax deduction at source.

Believing that the Assessee was engaged in a joint venture business with the UAE company and the Assessee had intentionally incurred sales promotion expenses for tax avoidance when it was actually a distribution of income, the AO invoked provisions of Section 9(1)(vii)(b) and Section 195 of the IT Act read with CBDT Circular No.7/2009 dated October 22, 2009, disallowing the amount by virtue of Section 40(a)(i) on failure to deduct tax at source.

Aggrieved, the Assessee preferred an appeal before CIT(A), who confirming the assessment order, observed that Explanation to Section 9(2) inserted vide Finance Act, 2010 led to the interference that the income of NRI shall be deemed to accrue or arise in India as per clause (v), (vi) or (vii) of Section 9(1), irrespective of any business connection in India or rendering of services in India.

Aggrieved, the Assessee approached the ITAT which analyzing the provisions of Explanation (2) to Section 195 and Section 40(a)(i), observed that both the Sections dealt with deduction of tax at source where the sum is chargeable under the IT Act. The obligation to deduct tax at source applied to all persons but it could not take away the fundamental requirement that the sum had to be chargeable under the provisions of the IT Act and therefore, only in a scenario, the sum was chargeable under the IT Act, the obligation was cast on all persons to deduct tax at source irrespective of the residential status or business connection or presence in India.

Further analyzing the relationship between the Assessee and the UAE based company, ITAT observed that the relationship between the two companies was that of principal and agent and thus, could not be termed as that of joint venture partners.

ITAT further observed that the provisions of Section 9(1)(vii) could not be attracted in the instant case as the Assessee had utilized the services of the non-resident service provider outside of India for the purposes of earning commission income from its customers/shipping companies outside of India.

Thus, ITAT concluded that the said amount paid to the non-resident entity did not fall within its scope of total income and consequently was not chargeable to tax in India. It was further observed that in absence of PE in India, such business income was not chargeable to tax in India and therefore, when the Assessee was not eligible to deduct tax under Section 195, provisions of Section 40(a)(i) also could not be invoked for making the disallowance.

ITAT allows write-off of investment in loss-incurring overseas subsidiaries as business loss

Maneesh Pharmaceuticals Ltd.
ITA No.4024/Mum/2019

The Assessee was a manufacturer and distributor of pharmaceutical products. The Assessee had written off the investments made by it in two companies in the Netherlands and Brazil which had accumulated heavy losses over a period as 'business loss'. The AO treated the investments as capital in nature and denied the business loss.

Aggrieved, the Assessee approached the CIT(A) which allowed the write off of investment in the Dutch company but disallowed it for the Brazilian company by holding that there was no proximate direct nexus of the investment and business of the Assessee.

Aggrieved, the Assessee approached the ITAT which observed that the Assessee made these investments in furtherance of business objectives and with a view to earn more revenue. Further, subject investment was guided by commercial expediency to push the sales in international markets, and gain access to foreign markets.

The ITAT further observing that the main purpose of such investments was not to acquire manufacturing / infrastructural capacity but to boost sales and the investments, noted that the subject investment could not be said to be capital in nature as it was meant to improve the top line of the business. The ITAT held that the investment was made for enhancement of business activity of Assessee in global market which primarily related to business operation of Assessee and the investment was not made with a view to create capital asset in the form of holding shares. Therefore, it was held that said loss during the course of business would be business loss and hence, was allowable deduction under Section 28(i) of the IT Act.

HC directs personal hearing; Quashes faceless assessment order passed without considering Assessee's objections

KBB Nuts Private Limited
2021-TII-32-HC-DEL-TP

The Assessee was subjected to scrutiny assessment and was served a SCN along-with a draft assessment order dated April 19, 2021, which was received by the Assessee via email on April 20, 2021, requiring the Assessee to respond by April 21, 2021.

Since the time for compliance was short, Assessee, filed an application via the e-portal, seeking a day's adjournment, i.e., till April 22, 2021. However, since no response was received qua the request for adjournment, the objections to the aforementioned SCN were filed on April 22, 2021 at 15:22 hours and the assessment order under Section 143(3) read with 144B was also passed on the same day.

Aggrieved, the Assessee preferred a writ petition before the HC contending a breach of the principles of natural justice as the objections filed on April 22, 2021 were not taken into account by the Revenue before passing the assessment order.

The Revenue on the other hand contended that the Assessee should not have assumed that adjournment was granted and should have furnished reply on April 21, 2021 instead of April 22, 2021 as the Revenue waited till April 22,

2021 to pass the assessment order.

HC rejecting Revenue's contention opined that Revenue's argument would have jelled if the assessment order was passed on April 22, 2021, albeit, after 23:59 hours.

Therefore, setting aside the order of the Revenue, HC directed the Revenue to pass a fresh assessment order after taking into account the objections filed by the Assessee qua the SCN dated April 19, 2021 by issuing a fresh notice via email to the Assessee and granting a personal hearing.

ITAT allows deduction of Corporate Marks Fee, paid to German AE, on 'crystallization of liability'

ThyssenKrupp Electrical Steel India Pvt. Ltd.
2021-TII-207-ITAT-PUNE-TP

The Assessee was engaged in producing and offering an entire range of non-ageing, energy conserving power core electrical steel products and quality carbon steel products of automotive.

The Assessee had filed its return of income. During the course of the assessment, the AO observed that the Assessee had made a payment to its German AE towards Corporate Marks Fees.

The Assessee expounded to the AO that it had entered into an agreement with its German AE for the use of licensed rights of the Central Signs which were the corporate mark and the signs and logo of the German AE for license fee @ 0.5% of its sale.

The AO asked the Assessee to explain the benefits derived, to justify the ALP of the transactions and to substantiate the benefits received on making the payment towards the Corporate Marks Fees.

The Assessee submitted that the use of Corporate Marks by the Assessee for its products and services was an assurance to the customers of its standard of quality and had a positive impact on the sales of the Assessee by helping it in its visibility in the Indian market. The Assessee further submitted that the usage of the Corporate Marks by the Assessee had helped it achieve its existing sales turnover primarily due to the fact that the Corporate Marks guaranteed a high recognition and a clear differentiation from the competition.

Not convinced, the AO concluded that no such benefits had accrued to the Assessee and that the Assessee had failed to substantiate the need for making said payments and thereby held the ALP of the Corporate Marks Fees as Nil and made an upward TP adjustment.

Aggrieved, the Assessee approached the CIT(A) which upheld the adjustment made by the AO which caused the Assessee to approach the ITAT.

Before ITAT, the Assessee submitted that the Corporate Marks Fees paid was disallowed by the Revenue only on the ground that the Assessee had paid Corporate Marks Fees prior to entering into the agreement where no consideration was charged by the AE.

The Hon'ble ITAT placing reliance on umpteen judgments of the Hon'ble HCs, allowed the deduction on the Corporate Marks Fees, granting deduction even for period prior to the year that fell within the scope of the agreement on the principle of crystallization of the liability. The ITAT thus held the payment made by the Assessee to be allowable for deduction because the liability stood crystallized in terms of the underlying Agreement.

ITAT deletes AMP-adjustment made on substantive and protective basis for non-existence of international-transaction

Amadeus India Pvt. Ltd.
2021-TII-185-ITAT-DEL-TP

The Assessee was engaged in the business of providing data processing/IT enable services/software services and call center services.

The Assessee's return of income was selected for scrutiny. In the first notice issued under Section 143(2), it was observed that Assessee had undertaken international transactions and specified domestic transactions with its AEs and the case was referred to TPO for determination of ALP.

The TPO made TP adjustments qua advertising, marketing and promotion expenses on a protective and substantive basis. This was done owing to TPO's belief that subject advertising, marketing and promotion expenditure incurred by the Assessee was meant for promotion of the brand/trade name owned by the AEs, and thus was an international transaction which was neither reported by the Assessee in Form 3CEB nor was it benchmarked in the TP Study.

Thereafter, the AO passed the draft assessment order, aggrieved by which the Assessee approached the DRP who directed the AO to complete the assessment. Consequent to the directions of DRP, the AO passed the final assessment order, aggrieved by which the Assessee approached the ITAT.

Before the ITAT, the Assessee objected to the adjustment made by the TPO by referring to coordinate bench order in Assessee's own case for earlier AYs wherein similar adjustment was deleted since existence of a 'transaction for brand promotion' was missing.

The ITAT relying on coordinate bench ruling in Assessee's own case for earlier AYs, observed in absence of agreement, arrangement or understanding between the Assessee and its AE for sharing AMP expenses or for incurring AMP expenses, payments made by the Assessee to the domestic parties cannot be termed as an "international transaction" especially when the TPO had not proved that the expenses incurred were not for the business carried out by the Assessee in India and a similar view was also upheld by the jurisdictional HC in earlier AYs.

Therefore, observing that the revenue failed to point out any distinguishing feature in the facts of the case for given AY and that of the earlier AYs, ITAT, applying the rule of consistency, directed the AO to delete TP-addition made on account of AMP expenditure on substantive, protective basis.

ITAT upholds combined accounts approach for ALP-determination

Tasty Bite Eatables Limited
2021-TII-187-ITAT-PUNE-TP

The Assessee was engaged in the manufacture and sale of ready to eat foods. The Assessee had 3 segments, namely Ready to Serve Food segment, Frozen Foods and Sauces and the Assessee exported finished goods to its AE in the USA and Australia.

The Assessee had filed its return of income reporting certain international transaction in Form No.3CEB owing to

which, AO made a reference to TPO for determining the ALP of the Ready to Serve Food segment segment, for which the Asseessee had applied TNMM as MAM at the segmental level for arriving at the ALP.

Though the Assessee maintained combined P&L for all segments, it tried to justify the Ready to Serve Food segmental claim by submitting a separate income statement allocating costs and income on a certain basis.

TPO refusing to accept such allocation, computed the PLI of Ready to Serve Food segment on the basis of entity level profit and loss account and subsequently proposed a TP-adjustment.

Aggrieved, the Assessee approached the ITAT contending that it had appropriated certain direct expenses to the Ready to Serve Food segment and allocated remaining expenses on the basis of certain allocation keys as provided in TPO's order.

ITAT noting that TPO had computed the ALP on the basis of entity level data as against the Assessee's plea for taking segmental level data, remarked that ensuring that all the relevant costs relating to the Ready to Serve Food segment were properly accounted for in the segmental income statement was important and any attempt to allocate more costs to this segment at the cost of the other segments needed to be eschewed.

Further, noting that some of the important raw material costs were common to Ready to Serve Food and Frozen Foods segments, ITAT observed that the Assessee had failed to demonstrate a rational allocation of import costs to Ready to Serve Food segment. Thereby, upheld the ALP determination on the basis of combined accounts approach.

ITAT upholds CIT(A)'s action of quashing final assessment order passed without draft order

Rolls-Royce India Pvt. Ltd.
2021-TII-188-ITAT-DEL-TP

The Assessee was a wholly owned subsidiary Rolls Royce International Ltd., operating through an office in India in order to provide commercial information services and market support services to Rolls Royce International Ltd. relating to Indian territory and neighboring countries.

The Assessee filed its revised return of income. The TPO proposed a TP adjustment and passed the draft assessment order, thereafter DRP reduced the TP addition and a final order was passed.

Aggrieved, the Assessee approached the CIT(A) who directed the AO/DRP to reexamine some of the comparables challenged by the taxpayer and to verify and allow the risk adjustment - this was further upheld by the ITAT which remitted the matter back to the file of the AO.

Subsequent to ITAT's remand for comparables selection and allowing risk adjustment, TPO passed an order giving partial effect to the ITAT's remand on the basis of which AO passed the assessment order without a draft assessment order.

Aggrieved, the Assessee approached the CIT(A) which quashed the assessment order passed on account of being invalid.

Aggrieved, the Revenue approached the ITAT which observed that considering the remand by Tribunal in first round of litigation, the only course available to the TPO was to re-examine the comparables by providing an opportunity of being heard to the Assessee rather than evolving its own procedure by passing order giving partial effect to the Tribunal's remand on the basis of which AO passed the assessment order, therefore, TPO/AO deprived the assessee to avail of their remedy to challenge the draft

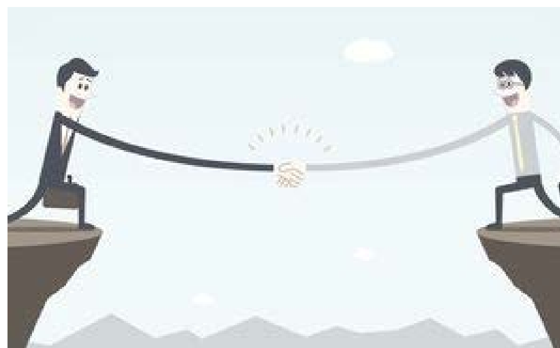
assessment order to be passed by the AO pursuant to the TP order passed.

Thus, upholding CIT(A)'s action of quashing final assessment order issued without passing draft order, the Hon'ble ITAT held that assessment order passed by the AO without passing draft assessment order to enable the assessee to approach DRP was not sustainable in the eyes of law.

ITAT retains Infobeans-Systems as comparable, holds merger not enough ground for exclusion of comparables unless existing business interrupted

NetHawk Networks India Pvt. Ltd.
2021-TII-224-ITAT-PUNE-TP

The Assessee rendered software development and testing services to its AE and filed its return of income. The Assessee had applied TNMM as the MAM for determination of the ALP of the services rendered. In doing so, it used PLI of operating profit/operating cost and chose ten comparables to show that the international transaction was at ALP.



The TPO retained two companies from the Assessee's list and added seven new companies and accordingly worked out the transfer pricing adjustment at INR 3,24,94,980/-. The DRP excluded one and included one company already chosen by the Assessee that was rejected by the TPO, thereby making total number of comparables at nine. This exercise by the DRP resulted in reducing the transfer pricing addition to INR 1,35,74,804/-.

Aggrieved, the Assessee approached the ITAT seeking exclusion of Infobeans Systems Pvt. Ltd. as a comparable on account of extraordinary event of merger.

The ITAT noted that a company can be excluded on the said ground only if the uninterrupted results of its hitherto continuously existing business get interrupted because of the abrupt infusion or diffusion on merger/demerger. However, if the company starts its operations *ab-initio* by taking over business of another entity from the first day of the financial year, without having any pre-existing business, there can be no question of distortion of its financial results because of merger. Having noted the above, the ITAT observed that the subject company commenced its actual business operations from the very first day of the relevant FY by taking over the software business of Seed Enterprises Pvt. Ltd. and had no separate independent business before the merger. Therefore, the ITAT held that financial results of this company for the relevant AY were not jeopardized in any manner because of the merger.

Thus, rejecting Assessee's plea for exclusion, the ITAT retained Infobeans Systems Pvt. Ltd. as a comparable and remitted the matter back to the file of AO/TPO for re-determining the ALP of the international transaction.

CBDT amends Rule 31A, prescribes new Annexure to Form 26Q

Notification No. 71/2021
June 8, 2021

CBDT notifies the Income-tax (17th Amendment) Rules, 2021 to amend Rule 31A of the IT Rules for furnishing particulars of amounts on which tax is not deducted under Sections 194A, 194, 196D, and 194Q. Further, the CBDT has also prescribed a new Annexure under Form 26Q.

CBDT notifies cost inflation index for FY 2021-22

Notification No. 73/2021
June 15, 2021

CBDT notifies the cost inflation index for FY 2021-22 as 317 with effect from April 1, 2022, applicable for AYs 2022-23 onwards.

Directorate (Systems) notifies procedure for Compliance Check on Secs. 206AB/206CCA

Notification No. 01/2021
June 22, 2021

With regard to recently introduced provisions attracting TDS on sale of goods, the Directorate of Income-tax (Systems) has notified the procedures for sharing of information with tax deductors/ collectors to check if the deductee/ collectee is a 'specified person' or not under Section 206AB/206CCA in the new functionality of "Compliance check for Sections 206AB & 206CCA" which shall be relevant in determining the rate of TDS.

Accordingly, the Directorate of Income-tax (Systems) has laid down the procedure starting with registration of tax deductors and collectors on the reporting portal by logging on to their respective e-filing portal and then accessing the compliance check functionality with the help of their respective TAN.

Further Directorate of Income-tax (Systems) has apprised of the two search modes available to the users, i.e, 'PAN search mode' and 'Bulk search' mode and informed about the availability of Reference Guide on Compliance Check and FAQs, under 'Resources' Section of Reporting Portal for any kind of assistance.

CBDT extends the limitation period for passing assessment and penalty orders, linking PAN with Aadhaar and processing of Equalisation Levy statements to Sep 30, 2021

Notification No. 74/2021
June 25, 2021

CBDT extends the limitation period for: (i) passing assessment and penalty orders, (ii) linking PAN with Aadhaar, (iii) processing of Equalisation Levy statements to Sep 30, 2021.

CBDT extends last date of payment under Direct Tax Vivad Se Vishwas Act, 2020, to Oct 31, 2021

Notification No. 75/2021
June 25, 2021

CBDT extends the last dates of payment under Direct Tax Vivad Se Vishwas Act, 2020, to Oct 31, 2021.

CBDT notifies Compliance Check for Sections 206AB & 206CCA

Circular No. 11/2021
June 21, 2021

CBDT notifies a functionality called "Compliance Check for Sections 206AB & 206CCA" on the reporting portal of the Income-tax Department which allows the tax deductor/collector to check if the deductee/collectee is a 'specified person' under Sections 206AB and 206CCA.

CBDT issues clarifications on the applicability of TDS provisions under Section 194Q

Circular No. 13/2021
June 30, 2021

CBDT provides clarifications on the applicability of TDS provisions under Section 194Q. The key clarifications have been discussed here as under:

Sr. No.	Point of Discussion	Clarifications
1	Period for calculation of threshold of INR 50 Lakhs	The threshold of INR 50 Lakhs would be calculated from April 1, 2021.
2	Applicability of TDS on advance received or purchase booked before July 1, 2021	Instances where following events occur before July 1, 2021, shall not be considered for the purpose of tax deduction: • Purchase booked before July 1, 2021, and payment made after July 1, 2021; or • Advance made before July 1, 2021, and purchase booked after July 1, 2021.
3	Whether taxable value to be considered inclusive or exclusive of GST	Taxable value for the purpose of Tax deduction shall be as follows: • In case of advance receipts, taxable value shall be inclusive of GST; • In case of purchases, taxable value shall be amount exclusive of GST.

Sr. No.	Point of Discussion	Clarifications
4	Treatment of purchase return while calculation of tax deduction	Tax is required to be deducted at the time of credit or payment whichever is earlier, hence, tax is likely to be deducted and paid prior to purchase return. However, if money is refunded against purchase return, then such deducted tax amount may be adjusted against next purchases.
5	Applicability of subject TDS provisions on non-residents purchasing goods from resident seller	Both resident and non-resident buyers shall be liable to deduct the TDS on purchase made from resident seller. However, in case of non-resident, the subject provisions shall only if following conditions are fulfilled: • Non-resident has PE in India. • Subject purchase is connected to the PE.
6	Applicability of subject TDS provisions where the seller is a person whose income is exempt	• TDS shall not be deducted on purchase made from the person whose total income is exempt. • Likewise, TCS shall not be collected on sales made to the person whose total income is exempt.
7	Clarity as to whether Section 194Q shall apply to the newly formed company in the year of its incorporation	As the condition of turnover more than 10 Crore in previous year is satisfied in the first year of the incorporation, subject provisions of TDS shall not apply. However, no clarification has been provided with regard to Sec. 206C(1H).
8	Clarity as to whether the limit of INR 10 crores shall include the income from non-business activities	Income only from business activities shall be considered for the calculation of limit of 10 crores. However, no clarification has been made with regard to Sec. 206C(1H).
9	Interplay when provisions of both the sections 194Q and 206C(1H) are applicable on a certain transaction	• When TDS has been deducted on a transaction under 194Q, provisions of Sec. 206C(1H) will not apply. • However, this circular has also clarified that if TCS has been collected under Sec. 206C(1H) for any reason, then buyer will no longer be responsible for deduction of TDS under Sec. 194Q.

Madras HC holds loss of inputs during manufacturing process to be eligible for ITC

ARS Steels and Alloy International Private Limited
2021-TIOL-1393-HC-MAD-GST

The Petitioners had subjected to assessment orders, whereby the Revenue had sought to reverse a portion of the ITC claimed, proportionate to the loss of the input during manufacturing of MS Billets, Ingots, etc. Aggrieved, the Petitioner had preferred a Writ before the Madras HC challenging the said assessment orders.

The HC observed that Section 17(5)(h) of the CGST Act relates to goods lost, stolen, destroyed, written off or disposed by way of gift or free samples. The loss that is occasioned by the process of manufacture cannot be equated to any of the instances set out in clause (h) of Section 17(5). It was further observed that the situations u/s. 17(5)(h) indicate loss of inputs that are quantifiable, and involve external factors or compulsions. A loss that is occasioned by consumption in the process of manufacture is one which is inherent to the process of manufacture itself.

In view of the above observations, the Madras HC held that the reversal of ITC involving Section 17(5)(h) by the Revenue, in cases of loss by consumption of input which is inherent to manufacturing loss is misconceived, as such loss is not contemplated or covered by the situations adumbrated under Section 17(5)(h) of the CGST Act.

Authors' Note

The issue relating to availement of credit in respect of inputs lost during manufacturing process persisted even under the erstwhile VAT and excise laws. The New Delhi Tribunal in the case of Cadbury India Limited **[2015-TIOL-1407-CESTAT-DEL]** had held that in case of inputs lost in work in process, the assessee is entitled to take CENVAT Credit. The instant judgement of the Madras HC will be a landmark under the GST regime as it brings a huge relief to the manufacturers.

Madras HC allows revision of TRAN-1 in absence of evidence of technical glitches

J Saraswathiammal Powerloom
2021-TIOL-1259-HC-MAD-GST

Following the implementation of GST, a batch of dealers under the erstwhile Tamil Nadu VAT Act had filed Form TRAN-1. However, the ITC available to them was not carried forward in the Electronic Credit Ledger. The dealers filed various representations before the Revenue authorities to allow the carry forward of ITC, however, the request was denied on the ground that the dealers did not prove technical glitches in the GSTN portal.

Aggrieved, the dealers filed Writs before the Madras HC seeking opening of the portal or permission to file revised TRAN-1 manually. The Madras HC observed that the stand of the Respondents to not allow revision of TRAN-1 in absence of evidence of technical glitches is too narrow and technical. Relying upon the judgement in Checkpoint Apparel Labeling Solutions India Private Limited **[2020-TIOL-1692-HC-MAD-GST]**, it was observed that the assessees could not have anticipated the requirement to produce evidence of technical difficulties by screen shots or otherwise to prove the same.

Basis the above observations, the Madras HC allowed the

Writs, directing the Respondents to take up the matter once again with GSTIN and ensure that TNVAT credit available to the Petitioners is duly reflected in the Electronic Credit Ledgers.

Authors' Note

During the initial stages of GST implementation, there had been gross confusion among the taxpayers and Revenue authorities alike. This confusion, coupled with portal issues, resulted in many taxpayers losing out on filing their returns and availing erstwhile ITC in due time. Considering the above difficulties, the Madras HC in Samrajyaa & Company **[2020-TIOL-381-HC-MAD-GST]** had allowed revision of TRAN-1 by observing that the era of GST is in a nascent stage and both the Department as well as assessees are still learning the ropes.

Chandigarh Tribunal allows refund of unutilized cesses lying in account on 01 July 2017

Schlumberger Asia Services Limited
2021-TIOL-313-CESTAT-CHD

The Appellant had initially availed credit of Education Cess and KKC into GST. Post the amendment to Section 140 of the CGST Act, whereby the term 'CENVAT Credit' had been contextualized with the term eligible duties, to disallow credit of cesses, the Appellant had duly reversed the credit of cesses so availed. Thereafter, the Appellant filed a refund claim of such cesses, being credit unutilized. The said refund claim came to be rejected by the Revenue on the ground of it being time barred as the GST came into effect on 01 July 2017.

Aggrieved, the Appellant preferred an Appeal before the Chandigarh CESTAT. The Tribunal observed that the amendment to Section 140 of the CGST Act came on 30 August 2018 i.e., after one year of the switching to the GST Regime which is applicable retrospectively. Accordingly, it was held that the Appellant could not have possibly have filed the refund claim within 1 year from 01 July 2017. Accordingly, it was held that the relevant date for the refund claim shall be 30 August 2018 and therefore, the refund application being filed in September 2018, is within the due date. In view of the above, the Chandigarh Tribunal set aside the refund rejection order and allowed the Appeal.

Authors' Note

It would be pertinent to note that even to this day, various taxpayers have refund claims of CVD, SAD pending, which had been filed post the introduction of GST on account of such tax becoming payable post the appointed day. It can be expected that that this judgement might support the claim of such taxpayers in availing their due refund claims.

Telangana HC raps Revenue for treating procedural lapse as evasion of tax

Satyam Shivam Paper Private Limited
2021-TIOL-1338-HC-TELANGANA-ST

The Petitioner had dispatched goods on 04 January 2020 along with the tax invoice and E-Way Bill with the driver of the vehicle. While the vehicle was in transit, there was a political rally opposing CAA and NRC by political parties, and therefore, the roads were blocked and the traffic could not move. Pursuant to waiting for a few hours, the driver of the vehicle took the goods to his residence until he could resume his journey on the following day.

The driver resumed the journey on the next working day however, the vehicle had been intercepted and detained by the Respondents. The Respondents alleged that the validity of the E-Way bill had expired and accordingly, demanded tax and penalty from the Appellant, vide Order in Form MOV-09, mentioning that the Appellant had admitted to the same. Aggrieved, the Petitioner preferred a Writ before the Telangana HC.

The HC observed that Respondent had blatantly ignored the representations filed the Petitioner, explaining the reasons for expiry of the E-Way Bill. It was further observed that the ignoring the representations of the Appellant on the premise that that there is clear evasion of tax is plainly arbitrary and illegal and violates Article 14 of the Constitution. The HC further observed that on account of non-extension of the validity of the E-Way Bill, no presumption can be drawn that there was an intention to evade tax.

In view of the above observations, the Telangana HC held that had been a blatant abuse of power by the Respondent in collecting from the petitioner tax and penalty. Accordingly, the HC deprecated the conduct of the Respondent in not even adverting to the response given by the Petitioner, and his deliberate intention to treat the validity of the expiry on the e-way bill as amounting to evasion of tax without any evidence of such evasion of tax. The HC allowed the Appeal and directed the Respondents to refund the tax and penalty to the Petitioner along with 6% interest p.a.

Authors' Note

It is a well settled principle of law that procedural lapses / infractions, should not lead to denial of substantial benefits to the taxpayers or assessees. However, it is seen that the Revenue authorities seldom abide by this principle and often subject the assessees with demand notices. It would be pertinent to note that the CBIC vide Circular No. 64/38/2018-GST dated 14 September 2018 had clarified that the penalties shall not be levied on minor infractions in E-Way Bills.

Although the said circular pertained clerical errors on the E-Way Bills, an analogy can be drawn that the Board, as well as the Government do not wish to penalize assesses in cases where the procedural infractions are caused by bona fide reasons.

TN AAR holds Track Assembly for Car-Seat Movement to be Classifiable under CTH 8708

Daebu Automotive Seat India Private Limited
2021-TIOL-149-AAR-GST

The Applicant engaged in the business of manufacturing seat components and accessories, had preferred an application before the Tamil Nadu AAR to ascertain the correct tariff classification of Track Assembly of Automotive Seating System. The said product is fitted on the floor of the car, which enables forward and backward movement of the seat. When seats are fixed on this TRACK ASSY it can slide back and forth with the operation of a lever for varying the positions of the seats.

The Applicant had been classifying the Track Assy. Under CTH 8708. However, as various manufacturers insisted the classification of the said product to be under CTH 9401, the Applicant had preferred the Advance Ruling. It was observed by the AAR that CTH 8708 covers parts and accessories of Motor Vehicles. It was further observed that in order to be classified as a part and accessory, the said item:

- Should not be excluded under Note 2 to Section XVII;
- Should be principally used with the automotive vehicle; and
- Should not be covered more specifically elsewhere in the Tariff.

The AAR observed that vehicle seats, being specifically mentioned in CTH 9401 is excluded from the purview of CTH 8708. It was however observed that CTH 9401 covers parts of seats of motor vehicles. 'Parts' are an amount or section which when combined with others makes up the whole of something. Hence part is an essential component of the whole without which the whole cannot be complete or cannot function. Accessories on the other hand, are not an essential component without which the whole cannot be complete or function, but it is a component which when added improves the utility, efficiency or appearance of the whole thing.

It was observed that the seat is manufactured and complete before fixing it on the said assembly. The seat is fixed on the track assembly only to facilitate the movement of seat forward and backward. Thus, it is the seat and track assembly are two individual, independent products, manufactured separately and fixed together to make the seat movable.

The AAR further observed that as seats are complete even without the said track assembly, the said assembly cannot be termed as 'Parts of seat'. Accordingly, the same would not merit classification under CTH 9401. In view of the above, it was observed that that the Track assembly is an accessory to the Motor vehicle and is covered under CTH 8708. The AAR also noted that the Track Fittings fulfill the above-mentioned conditions to merit classification under CTH 8708. In light of the above submissions, the Tamil Nadu AAR ruled that the Track Fittings manufactured by the Applicant are classifiable under CTH 8708 chargeable to 28% GST.

Authors' Note

The TN AAR has correctly interpreted the term 'parts' in as much as the Track Assy. Is a part of the automotive vehicle and not the car seats in itself as the seats are complete in themselves even without such fittings. It would be pertinent to note that is a similar ruling before the Gujarat AAR in the case of Shiroki Technico India Private Limited **[2021-TIOL-11-AAR-GST]**, it had been held that Seat Adjusters are classified under CTH 8708 as it does not give any shape or structure to the seat but merely helps the seat to slide back and forth as per the convenience/requirement or comfort of the driver or passenger.

Commissioner (A) rejects refund application on limitation, treating revised application date as original

Nirmal Industries Private Limited
O-I-A No. 01(MAA)CGST/JPR/2020 dated 01 January 2021

The Appellant had filed a refund application for the period December 2017 under Inverted Duty Structure on 20 January 2020. The Respondent had issued a deficiency memo on 23 January 2020. In response to said deficiency, the Appellant once again filed a refund application on 25 January 2020. The Revenue authorities rejected the said refund application on the ground of limitation of 2 years, by treating the application date as the date of filing the 2nd refund application. Aggrieved, the Appellant preferred an Appeal before the Commissioner (A).

The Commissioner (A) observed that in terms of Circular No. 125/44/2019 – GST dated 18 November 2019, the date of fresh application is to be considered as the original date of refund application. It was further observed that the said provision had come into effect from 01 February 2019. Accordingly, it was held that as the amendment is prospective in nature, the same will apply to all refund applications filed on or after the said date. In the instant case, as the Appellant had filed fresh refund application on 25 January 2020 which is beyond two years from relevant date, the Commissioner (A) upheld the refund rejection.

Authors' Note

While the action of the adjudicating authority as well as the Appellate authority is in line with Section 54 of the CGST Act and the Circular, what needs to be analysed is whether such a provision is justifiable. It would be pertinent to note that under the Customs law, the Ahmedabad Tribunal in the case of Banco Products India Limited **[2021-TIOL-143-CESTAT-AHM]**, had held that in case of correction of certain errors, the date on which the original claim was filed, is to be considered as the relevant date and not the date of revised application.

It would be pertinent to note that as a settled principle of law, circular being clarificatory in nature, cannot detract from the procedure laid down in the principal Act. This position was affirmed by the Bombay HC in the case of Narendra Udeshi **[2003-TIOL-68-HC-MUM-EXIM]**. Accordingly, it can be inferred that in absence of any provision under the CGST Act to consider the date of revised application as fresh date, Circular No. 125/44/2019 – GST dated 18 November 2019 does not hold good.

Madras HC holds that recovery cannot be against future receivables

Marg Human Resources Private Limited
2021-TIOL-1281-HC-MAD-GST

In pursuance of a search and investigation ordered, the Revenue had alleged that the Petitioner had been involved in availment of fraudulent ITC on fictitious invoices. Basis such allegation, the Revenue had issued attachment orders u/s. 83 of the CGST Act, which inter alia provides for provisional attachment to protect the interest of the Revenue. Aggrieved, the Petitioner preferred a Writ before the Madras HC challenging the attachment order.

The Petitioner argued that the attachment orders had completely strangled their business. The Petitioner prayed for lifting of the attachment orders, pending issuance of SCN u/s. 73 of the CGST Act and determination of tax u/s. 74 of the CGST Act.

The HC inter alia observed that attachment powers have been vested with the Officers u/s. 67 of the CGST Act, for

provisional attachments and the said proceedings also entails a provisional attachment of assets during the pendency of the proceedings under Sections 62, 63, 64, 67, 73 and 74 of the said Act. However, such protection cannot be made against future receivables.

The HC further observed that the Petitioner had already discharged 27.05% of the tax dues and was also willing to pay the final tax dues upon finalisation. The HC further remarked that there is no meaning in attaching bank accounts for future recoverable when there is a mechanism for proper adjudication of the tax due and determination under sections 73 and 74 of the Act.

In view of the above observations, the HC held that the attachment proceedings cannot be at the cost of right of provision under Article 19(1)(g) of the Constitution of India, which provides right to practice any profession or carry on any business. The HC further directed the Petitioner to pay a sum of money as agreed, whereafter the attachment orders shall stand vacated.

Authors' Note

It shall be noted that the power to order a provisional attachment of the property of the taxable person including a bank account is a drastic and far-reaching power which must be used sparingly and only on substantive weighty grounds and reasons. The power should be exercised only to protect interest of revenue and not to ruin business of any taxable person. The Apex Court in the case of Radha Krishan Industries **[2021-TIOL-179 -SC-GST]**, while dealing with the question of power of bank attachment, had asked the officers to strike a balance between protecting Government revenue and allowing genuine businesses to operate.

Maharashtra AAR holds GST to be payable on operating mini-AC buses for BEST

M P Enterprises and Associates Limited
2021-TIOL-147-AAR-GST

The Applicant had entered into an agreement with BEST for operation of AC mini buses for public transport. In terms of the agreed terms, the Applicant was required to provide drivers and incur fuel and maintenance expenses. However, the control of deployment of fleets, schedules, routes and assignment of responsibility to drivers, rested with BEST.

In view of the above arrangement, the Applicant had sought an advance ruling before the Maharashtra AAR to ascertain whether its activity is exempt under Sr. No. 23 of Notification No. 12/2017-Central Tax (Rate) dated 28 June 2017 which provides 'service by way of giving motor vehicle carrying more than 12 passengers on hire to a state transport undertaking'.

The AAR observed that there was transfer of right to use buses from the Applicant to BEST. BEST obtained effective possession and control over buses. Buses were plying as per directions and control of BEST. Further, the Applicant was not free to use buses for any other purpose. It was further observed that the Applicant had no say in deciding routes, schedules and frequency of buses or decide fares. Basis the above observation, the AAR held that the activity of the Applicant amounts to 'renting of motor vehicle' classifiable as rental services of transport vehicles with or without operators under SAC 9966.

Bangalore CESTAT holds that delay in reversing credit in GSTR-3B cannot be a reason for refund denial

Chariot International Private Limited
2021-TIOL-346-CESTAT-BANG

The Appellant had filed refund applications for refund of CENVAT Credit u/r. 5 of CCR r/w. Notification No. 27/2012-C.E. (N.T.). The said refund applications were proposed to be rejected on the ground that the Appellant has not debited the amount in the CENVAT register as required under the said Notification.

In response, the Appellant submitted that the CENVAT Credit balance was carried forward in the TRAN-1 under GST and the amount claimed as refund was reversed while filing GSTR3B for December 2017. Pursuant thereto, the refund applications had been duly sanctioned. Aggrieved, the Revenue preferred Appeal challenging the refund sanctioning orders, which had been allowed by the Appellate authority.

Aggrieved, the Appellant preferred an Appeal before the Bangalore CESTAT. The Tribunal observed that the refund was rejected on the premise that credit reversal in GSTR3B pertains to GST credit and not CENVAT credit. Accordingly, the Revenue authorities had invoked Section 142(3) and 142(4) of the CGST Act. It was further observed that the delay in reversing the credit amount in GSTR-3B is merely a procedural lapse and this was not examined before issuing the order. Further, referring to the judgement of Mumbai Tribunal in case of Sandoz Private Limited **[2015-TIOL-2076-CESTAT-MUM]**, the CESTAT allowed the Appeal and set-aside the refund rejection orders.

Chhattisgarh stays order denying ITC due to GSTR 2A-3B mismatch

Bharat Aluminium Company Limited
2021-TIOL-1414-HC-CHHATTISGARH-GST

The Revenue had sought to deny ITC to the Petitioner on the basis of matching of ITC availed in Form GSTR-3B with the details furnished by suppliers in Form GSTR-2A for the period 2018-19. Aggrieved, the Petitioner preferred a Writ before the Chhattisgarh HC challenging the order of denial of ITC.

The Petitioner argued that as per the Press Release of GST

Council dated 04 May 2018, there shall not be any automatic reversal of ITC of buyer on non-payment of tax by the seller. It was further argued that in case the seller has not paid the tax, a recovery has to be made from the seller. In the instant case, the Petitioner had come out with the purchases made, however, it did not match with 2A ITC shown by the seller meaning thereby the seller may not have filed return to remove the same.

Relying upon the judgement of the Madras HC in the case of DY Beathel Enterprises **[2021-TIOL-890-HC-MAD-GST]**, had held that if the default is made by non-payment of tax by the seller, the recovery shall be made from the seller and only in exceptional circumstances, it can be from the recipient, therefore, the ITC which was claimed by the Petitioner cannot be denied for the reason that the seller has not uploaded their invoices on time.

Staying the order denying ITC to the Petitioner, the Chhattisgarh HC has listed the matter further on 02 August 2021 for hearing.

Orissa HC condones delay in enclosing certified order-copy in COVID-times

Shree Udyog
2021-TIOL-1369-HC-ORISSA-GST

The Petitioner had preferred an Appeal before the GST Appellate authority. However, the certified order copy against which the Appeal was being filed had been uploaded belatedly with a delay of more than 3 months and 25 days. Accordingly, the Revenue had dismissed the Appeal on the ground that the appeal was not presented within the time prescribed under law. Aggrieved, the Petitioner preferred a Writ before the Orissa HC.

The HC observed that at the time of filling of the appeal, it was not accompanied by the certified copy thereof at that stage since the Lawyer who had filed the appeal was in self quarantine as he had come into contact with a client who had tested positive for COVID-19. It was further observed that acknowledging the difficulty faced by lawyers and litigants in obtaining certified copy, the explanation offered for the delay in furnishing such certified copy ought to have been accepted by the Appellate Authority and the delay in that regard ought to have been condoned.

It was further observed that mere delay in enclosing a certified copy of order appealed against along with the appeal should not come in the way of the Petitioner's appeal for being considered on merits by the Appellate Authority.

It was held by the HC that this was a case of substantial compliance and the interests of justice ought not to be constrained by a hyper technical view of the requirement that a certified copy of the order appealed against should be submitted within one week of the filing of the appeal.
It was further held that in these COVID times when there is a restricted functioning of Courts and Tribunals in general, a more liberal approach is warranted in matters of condonation of delay, which cannot be said to be extraordinary. Accordingly, the order dismissing the Appeal on limitation had been set aside.

Punjab and Haryana HC issues notice in Writ challenging retrospective amendment to Rule 61(5) of CGST Rules

Bharti Airtel Limited
104 CWP-11024-2021

By virtue of amendment to the Rule 61(5) of the CGST Rules, it was prescribed that the return in Form GSTR-3B is not intended to be in lieu of Form GSTR-3, and this change was brought in retrospectively with effect from 01 July 2017. GSTR 3B since then was demonstrated to be a return in cases where the time limit for furnishing details in FORM GSTR 1 and GSTR 2 had been extended with effect from 01 July 2017 but not being in lieu of GSTR 3.

The Petitioner has challenged the said amendment arguing that such amendment cannot unsettle the vested rights created in favour of assesses against imposition of interest as on the date of payment of tax. It was further argued that such amendment is unduly oppressive and confiscatory in nature and therefore arbitrary, illegal and bad in law. The Punjab and Haryana HC has listed the matter for further hearing on 05 July 2021.

Authors' Note

In the case of AAP and Co. [2019-TIOL-2004-HC-AHM-GST] the Gujarat HC had held that Form GSTR-3B is not a return u/s. 39 of the CGST Act. The HC had reasoned that Form GSTR-3B was an interim arrangement, which did not amount to a return under the Act. However, subsequently, upon challenge to the said judgement by the Revenue, the operation of said judgment was stayed by the SC **[2019-TIOL-543-SC-GST]**.

Delhi Tribunal reverses order disallowing credit for statutory gaps

Mammon Concast Private Limited
2021-TIOL-375-CESTAT-DEL

The Appellant had purchased melting iron scrap on High Sea Sales ('HSS') basis from various sellers during the period 2010-11 to 2012-13. During the course of the audit, the Revenue observed that the Appellant had availed CENVAT credit of input service on the strength of improper documentation in respect to the invoices, which were issued in the name of the high sea seller who sold the goods to the Appellant.

Basis the above observation, the Revenue alleged that the Appellant had availed CENVAT Credit in contravention of the CENVAT Credit Rules ('CCR'). Basis the said allegation, the Revenue had proposed to recover the CENVAT Credit along with applicable interest and penalty, which had been confirmed by an order. Aggrieved, the Appellant preferred an Appeal before the Tribunal.

The Tribunal observed that goods purchased were indeed inputs for the Appellant. It was further observed that manufacturer can avail CENVAT Credit on the basis of the invoice issued during the clearance of inputs from any of its premises where the goods are sold or on behalf of the said manufacturer. Similarly, it was observed that an importer is entitled to avail CENVAT Credit on inputs if the importer is registered in terms of the provisions of Central Excise Rules.

Further, referring to the Rule 4A(1) of Service Tax Rules, it was observed that the Appellant had substantially complied with the documentation requirement except the invoice not being in the name of the Appellant. Most importantly, it was observed that no specific documents had been mentioned considering the transaction of subsequent sale on high sea sale basis, in the Rules.

Therefore, it was observed that the scheme of the Act is to be read harmoniously with the Rules. Accordingly, the Tribunal held that if something is missing the Rules, reference can be drawn through the Act and credit cannot be denied for some gap left in the statute which will defeat the scheme of CENVAT credit. In view of the above, the Tribunal held that CENVAT credit availed by the Appellant was correct and accordingly the appeal was allowed with consequential reliefs.

Bangalore Tribunal holds that no one-to-one correlation is required between input-service and exports

General Motors Technical Centre India Private Limited
2021-TIOL-364-CESTAT-BANG

The Appellant engaged in providing Consulting Engineer Services to their clients located outside India had been availing the facility of CENVAT credit of service tax paid on input services which were required for providing the resultant output service as per the provision of CCR. In respect thereto, the Appellant had filed a refund claim for refund of unutilized CENVAT credit in respect of service tax paid on various input services said to have been used for providing output services exported outside India as per the provisions of Notification No. 27/2012-CE (NT) dated 18 June 2012 r/w. Rule 5 of the CCR.

The Revenue partly rejected the refund claim on the ground that certain input services were ineligible CENVAT credit. Aggrieved, the Appellant preferred an Appeal before the Bangalore Tribunal. The Tribunal observed that post the amendment to Rule 5 of the CCR, there is no need for one-to-one correlation between the input services and

the output services. It was further observed that the CBIC vide Circular dated 16 March 2012, had clarified that no correlation is required because the intention of the Government is to allow refund to the exporters and the Circular/clarification issued on this subject have to be viewed with the objective of allowing the refund.

In light of the above observations, the Bangalore Tribunal allowed the Appeal, holding that the Appellant was eligible to avail the CENVAT Credit.

FROM THE LEGISLATURE
GOODS & SERVICES TAX

Notification / Circular	Summary
Circular No. 09 T of 2021 dated 31 May 2021	**Clarification by Maharashtra Govt. on the due dates related to annual return filing in respect of MVAT** • The due date for filing the annual return and payment for FY 2019- 20 and 2020-21 were extended to 30 June 2021. • The dealers who have already filed quarterly returns for part of financial year of FY 19-20, periodicity in SAP could not be changed and hence, the filing of the balance part shall be continued to be filed in the same manner and periodicity for subsequent financial year would be in accordance with eligibility. Similar principle applicable to FY 20-21 also. • Cases where annual return has been filed and late-fee has been charged, the amount will be refunded and in case where dealers have not filed any return during FY 2019-20 and 2020-21, the return can be uploaded without late fees since due dates have been extended
Notification 01/2021-Central Tax (Rate) dated 02 June 2021	**GST Rate Reductions** • CBIC reduced the GST rate from 15% to 5% on MRO services in respect of ships/vessels • GST Rate on Diethylcarbamazine (DEC) tablets has been reduced from 12% to 5%

Notification / Circular	Summary
Notification No. 02/2021 – Central Tax (Rate) dated 02 June 2021	**ITC eligibility on apartments supplied by landowner-promoter** It has been notified that the landowner-promoter shall be eligible to utilise the ITC of tax charged by the developer promoter for payment of tax on apartments supplied by the landowner-promoter in such project.
Notification No. 03/2021 – Central Tax (Rate) dated 02 June 2021	**GST liability arises on date of OC or first occupation, whichever is earlier** It has been notified that the developer promoter shall be liable to pay GST in a tax period not later than the tax period in which the date of issuance of the completion certificate for the project, where required, by the competent authority, or the date of its first occupation, whichever is earlier.
Circular No. 156/12/2021-GST dated 21 June 2021	**CBIC clarifies on applicability of Dynamic QR Code on B2C Invoices** Pursuant to references received from trade and industry in respect to Dynamic Quick Response (QR) code applicability and to ensure uniformity in the implementation of provisions of law, CBIC vide Circular No. 156/12/2021-GST dated 21 June 2021 issued clarification in the said matter. The same has been elaborated below: • Any person who has obtained a Unique Identity Number (UIN), shall not be considered as a registered person as per sec 2(94) of the CGST Act and any invoice issued to such person, shall be considered as an invoice issued for a B2C supply and shall be required to comply with the requirement of Dynamic QR Code. • Separate details of bank account and IFSC is not required in the Dynamic QR Code, if UPI ID is linked to specific Bank Account of the payee/ person collecting money. • If the payment is collected by a person, authorized by the supplier on his/ her behalf, the UPI ID of such person may be provided in the Dynamic QR Code, instead of UPI ID of the supplier; • An invoice can be issued without Dynamic QR code to a recipient located outside India for which place of supply is in India, since the QR code cannot be used by recipient located outside India for making payment to the supplier in India in foreign exchange through RBI approved mediums; • In case of retail sales over the counter, where invoice number is not available at the time of digital display of dynamic QR code, and invoices/invoice number are generated after payment, the unique order ID/sales reference number may be provided in Dynamic QR Code for digital display, as long as details of unique order ID/ sales reference linkage with invoice are available on processing system of merchant/supplier and cross-reference of such payment along with unique order ID/ sales reference number are also provided on invoice; • When the part-payment for any supply has already been received from the customer/ recipient, in form of either advance or adjustment, then the Dynamic QR code may provide only the remaining amount payable by the customer/recipient against "invoice value". The details of total invoice value, along with details/ cross reference of the part payment/ advance/ adjustment done, and the remaining amount to be paid, should be provided on the invoice.

Notification / Circular	Summary
Circular No. 149/05/2021 - GST dated 17 June 2021	• As per entry 66 of Notification No. 12/2017-C.T.(Rate), catering service provided to an educational institution, including Anganwadi, is exempt from GST, irrespective of its funding from Government grants or corporate donations.
Circular No. 150/06/2021 - GST dated 17 June 2021	• In terms of Entry no. 23A of Notification No. 12/2017 CT(R) dated 28 June 2017, GST is exempt only on services falling under head 9967 by way of access to a road or a bridge on payment of annuity. • However, construction of road falls under Head 9954 and even if consideration for construction of road service is paid partially upfront and partially in deferred annual payments (and may be called annuities), does not get cover under Entry no. 23A of NN 12/02017 CT(R). Thus, GST is not exempt on the annuity (deferred payments) paid for construction of roads.
Circular No. 151/07/2021 - GST dated 17 June 2021	• GST is exempt on services provided by Central or State Boards (including the boards such as NBE) by way of conduct of examination for the students, including conduct of entrance examination for admission to educational institution [under Sr. No. 66 (aa) of Notification No. 12/2017-CT(R) dated 28 June 2021]; • GST shall not apply to any fee or any amount charged by such Central or State Boards, including NBE, for conduct of such examinations including entrance examinations; • GST is also exempt on input services such as online testing service, result publication, printing of notification for examination, admit card and questions papers etc. when provided to such Boards; • Any other services by such boards, shall attract GST @ 18%, namely of providing accreditation to an institution or to a professional (accreditation fee or registration fee such as fee for FMGE screening test) so as to authorize them to provide their respective services
Circular No. 152/08/2021 - GST dated 17 June 2021	• 12% GST rate is chargeable under entry No. 3 (vi) of Notification No. 11/2017- CT (R) dated 28 June 2017 for services provided to a Government Entity, in relation to construction such as of a Ropeway on turnkey basis; • The said concessional rate benefit does not apply to any works contract that is meant for the purposes of commerce, industry, business of profession, even if such service is provided to any Government authority; • Civil construction such as rope way shall not be covered under entry 3(vi) not being a structure that is meant predominantly for purposes other than business; • Works contract service provided by way of construction such as of ropeway shall fall under entry at Sr. No. 3(xii) of notification 11/2017-(CTR) dated 28 June 2017 and attract GST at the rate of 18%.
Circular No. 153/09/2021 - GST dated 17 June 2021	• Sr. No. 3A of Notification No. 12/2017 – CTR dated 28 June 2021 inter alia exempts composite supply in which the value of supply of goods constitutes not more than 25% of the value of the said composite supply provided to the Central Government, State Government or Union territory or local authority or a Governmental authority or a Government Entity by way of any activity in relation to any function entrusted to a Panchayat;

Notification / Circular	Summary
	• The said entry No. 3A would apply to composite supply of milling of wheat and fortification thereof by miller, or of paddy into rice, provided that value of goods supplied in such composite supply (goods used for fortification, packing material etc.) does not exceed 25% of the value of composite supply. Accordingly, it is a matter of fact as to whether the value of goods in such composite supply is up to 25% and requires ascertainment on case-to-case basis; • In case the supply of service by way of milling of wheat into flour or of paddy into rice, is not eligible for exemption under Sl. No. 3 A of Notification No. 12/2017- Central Tax (Rate) dated 28 June 2017 for the reason that value of goods supply in such a composite supply exceeds 25%, then the applicable GST rate would be 5% if such composite supply is provided to a registered person, being a job work service; • A person registered only for the purpose of deduction of tax under section 51 of the CGST Act is also entitled for 5% rate
Circular No. 154/10/2021 - GST dated 17 June 2021	• Guaranteeing of loans by Central or State Government for their undertaking or PSU is specifically exempt under GST
Circular No. 155/11/2021 - GST dated 17 June 2021	• Laterals / parts of Sprinklers or Drip Irrigation System to be used solely or principally with sprinklers or drip irrigation system, which are classifiable under heading 8424, would attract a GST of 12%, even if supplied separately; • Any part of general use, which gets classified in a heading other than 8424, shall attract GST as applicable to the respective heading considering the terms of Section Note and Chapter Notes to HSN

FROM THE JUDICIARY
CUSTOMS & TRADE LAWS

CESTAT holds goods sold in DTA similar to those exported; quashes Department's contention of wrongful availment of exemption benefit

BR Steel Products Pvt. Ltd.
2021-TIOL-317-CESTAT-MUM

The assessee is an EOU, engaged in the manufacture and export of 'Ceramic Colours. The assessee also cleared these products in DTA and claimed exemption of Notification No. 23/2003-CE dated March 31, 2003, which exempted 'similar' export goods when cleared in DTA by an EOU.

Department contending that the items cleared in DTA by the Assessee were not similar to the goods exported and that there was violation of the provisions of FTP, alleged that exemption contained in the abovementioned notification to be wrongly availed by the Assessee and subsequently, issued two SCNs, seeking to recover the duty forgone on such clearances.

Aggrieved, the Assessee approached the CESTAT contending that the only difference between the goods

cleared for exports was that they were more in concentrate form when compared to the goods cleared in DTA. Further, in the commercial parlance, ceramic colours in diluted form and ceramic colours in concentrated form were known, understood and traded as ceramic colours only. Therefore, the Department erred in holding that the goods were not similar or that the provisions of FTP were violated. CESTAT observed that the word 'similar' would mean the same class of or same kind of goods, and in the instant case, the goods exported and the goods cleared were described as ceramic colours. The similarity of the goods was established beyond reasonable doubt by the test report that was conducted on the impugned goods which indicated that they had similar composition and that the only difference in goods was their form (concentrated or diluted). Therefore, there was not even an iota of doubt that the goods cleared by Assessee were nothing but the goods which were similar to the goods exported well within the meaning assigned to the same in FTP.

Thus, finding no suppression, leave alone intent to evade duty, CESTAT allowed the appeal.

HC directs CESTAT to await decision of SC, quashes CESTAT order remanding matter to adjudication authority

Shri Sanket Praful Tolia
2021-TIOL-1306-HC-MAD-CUS

The Appellant (Revenue) was the Commissioner of Customs, Tuticorin who had approached the Madras HC, aggrieved by the order of the CESTAT which placing reliance on the judgment of the Delhi HC in Mangali Impex V. Union of India [2016-TIOL-877-HC-DEL-CUS], which was pending consideration before the SC, remanded the matter to the adjudication authority instead of awaiting the decision of the SC.

Therefore, the question of law before the HC was that when Sec.28(11) of Customs Act, 1962 envisaged all persons appointed as officers of Customs under sub-Section (1) of Section 4 of Customs Act, 1962 before July 6, 2011, to be deemed to have and always had the power of assessment under Section 17 of Customs Act, 1962 and to be deemed to have been and always had been the proper officers for the purposes of this Section, whether CESTAT was correct in disputing/questioning the jurisdiction of DRI to issue SCN.

The HC observed that the question of law could not be adjudicated upon as the judgment of the Delhi HC in Mangali Impex V. Union of India [2016-TIOL-877-HC-DEL-CUS] was pending consideration before the SC, However, CESTAT erred in setting aside the order passed by the Appellate Authority and remanding the matter to the Adjudicating Authority.

Therefore, allowing the appeal, the HC, setting aside the order of the CESTAT, restored the appeal to the file of the CESTAT with a direction to keep the appeals pending and await the decision of the SC.

CUSTOMS & TRADE LAWS

Notifications	Key Updates
Notification No. 33/2021-Customs (ADD) dated June 03, 2021	**Anti-dumping duty on Phenol** CBIC has extended anti-dumping duty on Phenol originating in or exported from European Union and Singapore to October 31, 2021 from June 7, 2021.
Notification No. 33/2021-Customs dated June 14, 2021	**IGST on import of oxygen concentrators** CBIC has rescinded the Notification that reduced IGST on import of oxygen concentrators for personal use from 28% to 12% till June 30, 2021.
Notification No. 36/2021-Customs (ADD) dated June 29, 2021	**Anti-dumping duty on 'Hot-Rolled flat products of alloy or non-alloy steel'** CBIC has extended anti-dumping duty on 'Hot-Rolled flat products of alloy or non-alloy steel' originating in or exported from China PR, Japan, Korea RP, Russia, Brazil or Indonesia till December 15, 2021.
Notification No. 37/2021-Customs (ADD) dated June 29, 2021	**Anti-dumping duty on 'Cold-Rolled flat products of alloy or non-alloy steel'** CBIC has extended anti-dumping duty on 'Cold-Rolled flat products of alloy or non-alloy steel' originating in or exported from China PR, Japan, Korea RP or Ukraine till December 15, 2021.
Notification No. 34/2021-Customs dated June 29, 2021	**Reduction of BCD on Crude Palm Oil** CBIC has reduced the BCD on Crude Palm Oil [CTH 1511 10] to 10% and that on Palm Oil other than Crude Palm Oil [CTH 1511 90] to 37.5% till September 30, 2021.

FOREIGN TRADE POLICY

Notifications/Trade Notices/Public Notices	Key Updates
Notification No. 08/2015-2020 dated June 14, 2021	**Amendment in export policy of Remdesivir and Remdesivir API** The export of Remdesivir injection and Remdesivir API has been restricted. Export of Remdesivir injection/API against advance authorisation will not require separate authorisation/permission.
Public Notice No. 06/2015-20 dated June 14, 2021	**APEDA designated as agency authorized to issue RCMCs for Cashew Kernel, Cashewnut Shell Liquid and Kardanol** Cashew Export Promotion Council of India’s powers to issue/renew RCMCs for products falling under their jurisdiction have been suspended and APEDA has been designated as the agency authorized to issue RCMCs for cashew kernels, cashew nut shell liquid and kardanol. RCMCs already issued by Cashew Export Promotion Council of India, however, will remain valid for the rest of their validity period.

HC quashes arbitral-award requiring BCCI to pay about INR 4,800 Cr. to Deccan Chargers for IPL Agreement-termination, imposes INR 10 Lacs as cost on Deccan Chargers

Board of Control for Cricket in India vs. Deccan Chronicle Holdings Ltd.
Commercial Arbitration Petition (L) No. 4466 of 2020

The Petitioner, the governing body of cricket in India, preferred a petition before the HC, aggrieved by the arbitration award of the sole arbitrator directing the Petitioner to pay the Respondent over INR 4,800 Cr along with 10% interest and INR 50 Lacs in costs for premature termination of Franchise Agreement with the Respondent, contending that some of the conclusions in the award were perverse and patently illegal, the award took into account wholly irrelevant material, including material not on record, and travelled well beyond the contract, the award impermissibly imported principles from public law, and especially considerations of Article 14, which are entirely outside the remit of any private law arbitral tribunal, and the fundamental policy of Indian law did not permit an arbitral tribunal to invoke these public law principles in deciding private law commercial disputes controlled and constrained by contract.

The HC observed that the arbitrator's finding that the agreement termination by the Petitioner was 'premature' was entirely unsustainable, inasmuch as it completely elided vital evidence before the tribunal, As by definition, 'premature' meant not just waiting for a calendar day to pass for the sake of it, but to give the fullness of opportunity to the noticed party to comply with the demand, and noting that according to the Respondent itself, it had cured all the defaults on the day of termination, there was simply no possibility of it sustaining a claim that the termination had been effected a day before it could comply, depriving it of an opportunity of compliance.

The HC also observed, that the Award granted compensatory damages for a party's inability or failure to perform and not damages in lieu of specific performance and yet stated the contrary and thus was in violation of the fundamental policy of Indian law.

Further, observing that the award granted relief that was never sought and proceeded in places without reasons, taking impossible views, the HC held that the award effectively rewarded the party in its unquestionable breach of contractual obligations.

Therefore, setting aside the award of the sole arbitrator, HC imposed INR 10 lacs as cost on the Respondent.

Authors' Note:

In the instant case, the HC observed that instead of addressing the defaults as per the Franchise Agreement, the sole arbitrator went on to grant reliefs that were never sought and take views that were impermissible in law. The HC, therefore rightly concluded that the award effectively rewarded the party in its unquestionable breach of contractual obligations.

SC dismisses appeal seeking stay on Devas Multimedia's liquidation proceedings

Devas Multimedia Pvt. Ltd. vs. Antrix Corporation Ltd. & Anr.
Civil Appeal No. 1848 of 2021

The Appellant company had entered into a lease agreement with the Respondent corporation for space segment capacity on ISRO/Antrix S-Band Spacecraft. However, this agreement was terminated by the Respondent corporation in 2011 on the ground that the Appellant company had committed fraud in collusion with the officials of the Respondent corporation, Department of Space and ISRO which resulted in huge financial loss to the Central Government.

Accordingly, the Central Government passed a sanction order authorizing the Chairman and MD of the Respondent corporation to appear before the NCLT and petition for the winding up of the Appellant company.

Agreeing with the contentions of the Respondent corporation, NCLT held that the Appellant company was incorporated for fraudulent purposes, coupled with malafide objects to enter into Agreement with the Respondent corporation and therefore directed that the Appellant company be wound-up.

The ex- Director of the Appellant company preferred an appeal before NCLAT which after hearing the matter directed the Respondent company to file a counter-affidavit within 4 weeks and the Appellant company to file rejoinder within 1 week, and listing the matter for final disposal, on July 8, 2021, passed an interim order.

Meanwhile, aggrieved by the interim order of the NCLAT, ex-Director of the Appellant company preferred an appeal before the SC, seeking a stay on liquidation of the Appellant company (as was directed by the NCLT) and praying that the same should not have a bearing on the arbitration proceedings pending before the HC.

However, SC dismissed the appeal, observing that the order did not give rise to any question of law.

Authors' Note:

It is interesting to note that Devas Multimedia was awarded $1.3 billion by ICC in 2017 which it has yet to collect despite having its claim further endorsed by various courts including the United Nations Commission on International Trade Law tribunal in October 2020. Furthermore, Germany's Deutsche Telekom is suing the Indian government for $135 million in a US court in the District of Columbia on the ground that the Indian government had violated a bilateral investment treaty between Germany and India signed on July 10, 1995 for Promotion and Protection of Investments with the cancellation of the Devas-Antrix deal in 2011.

SC held proceedings under Section 34 of Arbitration Act not maintainable against foreign award

Noy Vallesina Engineering SpA vs. Jindal Drugs Ltd.
2020-TIOLCORP-38-SC-MISC

The Appellant is an Italian company involved in the setting up and construction of plants for production of synthetic fibers, polymers and ascorbic acid.

The Respondent is a public company that had entered into four related agreements with a Swiss company to set up an ascorbic acid plant in India. These were: (i) Engineering Contract for Ascorbic for Acid Plant (ECAAP, or "plant

contract"); (ii) Supply contract for Ascorbic Acid plant (SCAAP or "supply contract"); (iii) Service agreement for Ascorbic Acid plant (SAAAP "service contract"); and (iv) License agreement for Ascorbic acid plant (LAAAP "license contract"). All these agreements had an arbitration clause.

Under the plant contract, the Swiss Company agreed to provide the Respondent with technical information and basic engineering documentation for the construction, commission, operation and maintenance of the Ascorbic Acid Plant ("the plant"). In consideration of the Swiss Company's obligations, The Respondent was to pay a total fee of Swiss Francs 86,00,000/- in the manner provided in the Agreement.

Subsequently, The Swiss Company with the consent of the Respondent, assigned the plant contract to the Appellant, therefore all the obligations of the Swiss Company towards the Respondent were taken over by the Appellant.

Dispute arose between the Appellant and the Respondent which caused the Appellant to terminate the contract and claim damages.

The Respondent thus invoked the arbitration clause before the ICC, Paris which rejecting the Respondent's claim, awarded Swiss Francs 44,33,416/- to the Appellant through a partial award.

Aggrieved by the partial award, the Respondent filed a petition before a single judge of the HC under Section 34 of the Arbitration Act who held that since the partial award was a foreign award, a challenge through a petition was not maintainable under Section 34 of the Act. However, on appeal by the Respondent, HC Division bench set aside single judge's order.

Aggrieved, the Appellant approached the SC contending that the HC order was erroneous and the foreign awards having been rendered outside India under the ambit of the ICC could not be challenged merely because a condition in the underlying contract stated that the law governing the agreement, would be Indian law.

SC setting aside the order of the Division Bench of HC, upheld the decision of the single judge stating that proceedings under Section 34 of Arbitration Act were not maintainable against foreign award.

Authors' Note:

In Bharat Aluminium Company vs Kaiser Aluminium Technical Services Inc [2012 (9) SCC 552], a five-judge bench of the SC observed that, in keeping with the scheme of the international instruments, such as the Geneva Convention and the New York Convention as well as the UNCITRAL Model Law, the regulation of conduct of arbitration and challenge to an award is to be done by the courts of the country in which the arbitration is being conducted. Such a court is then the supervisory court possessed of the power to annul the award. It is the sovereign right of a country to regulate, through its national courts, an adjudicatory duty being performed in its own country.

SEBI relaxes minimum vesting period for ESOPs in event of death

SEBI has amended the SEBI (Share Based Employee Benefit) Regulations, 2014 ("SBEB Regulations") through notification No. SEBI/HO/CFD/DCR2/CIR/P/2021/576 dated June 15, 2021, and thereby, relaxing the requirement of minimum vesting period of 1 year in case of ESOPs in specific event of death of an employee.

Regulation 18(1) and 24(1) of the SBEB Regulations provides that there shall be a minimum vesting period of one year in case of ESOPs and Stock Appreciation Rights ("SAR").

Further, regulation 9(4) of the SBEB regulation states that in the event of death of the employee while in employment, all the options or benefits shall vest in the legal heirs or nominees of the deceased employees at the end of one year.

These provisions have been amended and from April 1, 2020, the regulations relating to the requirement of minimum vesting period shall not apply in the event of the death of the employee and all the options or benefits to the deceased employee shall vest in the legal heirs or nominees immediately on death of the employee.

However, in all other cases, such requirement of minimum vesting period shall continue the way it is prior to this amendment.

Authors' Note:

This move is aimed to provide relief to the families of the deceased employees of listed companies in view of the Covid-19 pandemic situation. The COVID-19 pandemic has taken the lives of many, leaving their families in troubled waters. In such scenario this relaxation is a welcome move where the value of ESOPs held by the deceased are significant and have a vesting period restriction, forcing families to wait to receive the benefits. This way companies would be able to provide an immediate support to families of deceased employees.

Board meetings to convene through virtual mode regularly

Section 173 read with rule 3 & 4 of the Companies (Meetings of Board and its Power) Rules, 2014 lay down the legal provisions with respect to holding Board meetings through video conferencing (VC) or other audio-visual mean (OAVM). Whereas the section 173 allows holding board meeting through physical as well as through VC or OAVM and rule 3 of the Companies (Meetings of Board and its Power) Rules, 2014 deals with the procedure, for convening and conducting the Board meeting through VC or OAVM.

Rule 4 of the of the Companies (Meetings of Board and its Power) Rules, 2014 provided that matters listed below shall not be dealt with in any board meeting convened through VC or OAVM:

- Approval of the financial statements;
- Approval of the Board's report;
- Approval of the prospectus;
- Audit committee meetings for consideration of financial statement including consolidated financial statement if any, to be approved by the board under sub section (1) of section 134 of the Act; and
- Approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

Earlier due to nationwide lockdown, temporary relaxation was given to conduct above matters by VC or OAVM till June 30th, 2020 which was later extended till June 30th, 2021. Keeping in view the on-going pandemic conditions, the entire Rule 4 has been omitted and henceforth, all matters including above can be transacted in a board meeting conducted thru VC or OAVM.

Authors' Note:

MCA had initially provided periodic relaxations to support corporate sector to conduct board meetings thru virtual mode. However now the corporate sector as well as MCA has realized that entire world is going thru a change and

everyone has now learned as well as accepted that important business can be conducted thru e-meeting or virtual meetings. Therefore, rightly so, MCA has permanently omitted such requirements of conducting certain meeting compulsorily in physical form. Currently companies are holding board meetings to accept their annual financial statements and it was difficult to conduct physical meetings in view of on-going situation of Covid-19, hence this amendment would surely provide relief and give a direction in long term planning.

MCA broadens the definition of Small and Mid-Sized Companies

MCA has widened the definition of small and medium sized companies (SMCs) vide notification dated June 23, 2021 for application of simplified accounting regime for companies having turnover up to INR 250 crores or borrowings up to INR 250 crores.

To give effect to the new definition, new Companies (Accounting Standards) Rules, 2021 has also been notified which would become effective form April 1, 2021. These rules will provide for the definition of SMCs and mandatory application of accounting standards in preparation of general purpose financial statements.

Earlier, Companies (Accounting Standards) Rules, 2006 provided for the definition of SMCs and mandatory application of accounting standards in preparation of general purpose financial statements. These rules were applicable based on limits prescribed in old definition of SMEs.

Revision of the limits of SMCs is as follows:

Particulars	Companies (Accounting Standards) Rules, 2006	Companies (Accounting Standards) Rules, 2021
Definition of SMCs	A company: • Whose securities are not listed or not in process of listing; • Which is not a bank, financial institution or an insurance company • Turnover ≤ INR 50 crores (Proceeding Accounting Year) • Borrowrings ≤ INR 10 crores (Proceeding Accounting Year) • Which is not a holding or subsidiary company of a company which is not a SMC.	A company: • Whose securities are not listed or not in process of listing; • Which is not a bank, financial institution or an insurance company • Turnover ≤ INR 250 crores (Proceeding Accounting Year) • Borrowrings ≤ INR 50 crores (Proceeding Accounting Year) • Which is not a holding or subsidiary company of a company which is not a SMC.
Obligation to comply with Accounting Standards	Every company and its auditor shall comply with accounting standards.	Every company other than a company on which Ind ASs are applicable, shall comply with accounting standards.
Qualification for exemptions or relaxations	A company becomes a SMC subsequently shall be qualified for exemptions or relaxations in respect of Accounting Standards available to SMC.	A company becomes a SMC subsequently shall be qualified for exemptions or relaxations in respect of Accounting Standards available to SMC.

Authors' Note:

This is a welcome move. The expansion in the scope of the simpler accounting regime for SMCs follows redefinition of small and medium enterprises in the country. As per the new definition, effective July 2020, businesses with investment in plant and machinery up to Rs.50 crore and annual sales of not more than Rs.250 crore are defined as medium-sized companies in the manufacturing sector.

The increase in turnover and borrowing threshold is expected to help a number of companies and promote ease of doing business.

The Accounting Standards for SMC which were notified in December 2006 and amended from time to time are much simpler as compared to Indian Accounting Standards (Ind AS). These accounting standards involve less complexity in its application including the number of required disclosures requirements. It is important to note that various such requirements were onerous for SMCs sector as that increased time and effort for companies to prepare financial statement without any added insight to investor into financial affairs of the company.

MCA allows holding EGM by virtual means

The ministry of corporate affairs (MCA) has extended the time limit for conducting extraordinary general meetings (EGMs) through video conference or other audio-visual means till December 31, 2021. The extension also applied to provisions for passing of resolutions through postal ballots alone without the need for conducting an EGM.

Further, for passing of business resolutions in such non-physical EGMs, the MCA laid down a detailed procedure wherein voting could be done via e-voting facility or registered email with the results being posted on the company website or filed with the Registrar of Companies.

This period of relaxation on holding EGM through VC or OAVM has been extended many times due to the spread of Covid-19.

Authors' Note:

The relaxation is important as the corporates are currently unable to assess the time period it will take for business to resume to normal conditions. This will provide the much-needed relief to companies, while safeguarding health of individuals and ensuring compliance with statutory provisions.

Given the on-going circumstance of surging COVID-19 infections, many countries around the world still have in place travel/visa restrictions and are taking continued taking steps to curtail international travel of people.

Whereas the Government is promoting the digital reforms in India by shifting many activities on digital platforms, these steps of MCA seems contributing in the Government digital reforms. However, we need more such steps to shift more and more transaction on digital platforms to increase ease of business.

SEBI Introduces New Delisting of Equity Shares Regulation

SEBI has introduced the SEBI (Delisting of Equity Shares) Regulations, 2021 ('Delisting Regulations'), thereby superseding the erstwhile SEBI (Delisting of Equity Shares) Regulations, 2009 ('Erstwhile Regulations'). Erstwhile regulations have been amended according to the changing need and developments in the securities market.

Earlier, if any company becomes non-compliant and wishes to go private; it has to delist its shares. However, given the cumbersome process of delisting, they have chosen to remain listed. This new delisting regulations provide for flexible and easy way to companies to delist its share to go private.

Salient features of new delisting regulations are as follows:

Background and Scope:

- These regulations shall be applicable to delisting of the equity shares of a company including equity shares having superior voting rights.
- These regulations shall not be applicable to the delisting of equity shares of a listed company:
  - That have been listed and traded on the innovator's growth platforms ('IGP') while making public issue;
  - Made pursuant to a resolution plan approved under Insolvency Code which provides for delisting of such shares or an exit opportunity.

Conditions for Delisting:

Both the company and the acquirer proposing delisting of shares shall have to satisfy following conditions for the delisting of a company:

- 3 years of listing of such class of shares have elapsed.
- There are no outstanding instruments convertible into equity shares sought to be delisted.
- 6 months have elapsed from the date of completion of buy-back of equity share capital.
- 6 months have elapsed from the date of allotment of preferential allotment.
- Acquirer proposing delisting of shares had not sold the equity shares of the company during the period of 6 months prior to the date of the initial public announcement.

Voluntary Delisting:

Where the company choose to go private to get the relief from various procedural and legal compliances, these regulations provide for conditions and procedure for voluntary delisting. There are below options of voluntary delisting available to the company:

- **No exit opportunity is provided:** Prerequisite for the voluntary delisting is that the equity shares remain listed on any stock exchange that has nationwide trading terminals.

- **Exit opportunity is provided:** Equity shares of the company may be delisted from all the RSEs having nationwide trading terminals after exit opportunity is provided by the acquirer to all public shareholders.

Procedure for delisting of equity shares remains same as provided in the erstwhile delisting regulations. However, following changes have been introduced:

Shifting of responsibility of disclosure: Erstwhile delisting regulations cast the responsibility upon the BOD for disclosure regarding delisting to the stock exchange. However, new delisting regulations have shifted such responsibility from the BOD to the acquirer and such acquirer shall intimate the company on its registered office.

New time restrictive procedure: The delisting procedure involves intricacies requiring approvals at various stages. Erstwhile regulations did not provide for timelines for various approvals which have caused the process a long-drawn process. However, new delisting regulations have specified timelines for various approvals making it less cumbersome.

Appointment of Peer Review Company Secretary: Earlier the board had to appoint a merchant banker to carry due diligence for any public announcement and afterwards the acquirer had to appoint merchant banker to act as manager to offer.

To avoid such conflict, the new regulations provide for appointment of Peer Review Company Secretary for carrying out due diligence who shall be independent. Further, the acquirer shall appoint a Merchant Banker to

act as manager to the offer.

Escrow Account: New regulations has shifted the point of responsibility to open and deposit the money in an escrow account from day after taking in-principal approval to the day before applying for in-principal approval from the RSE.

Introduction of Indicative Price: Earlier there was no concept of indicative price. However, companies used to offer indicative or attractive prices to lure the shareholder. Now these new regulations have introduced this concept wherein it has been defined as being a price higher than the floor price.

Compulsory Delisting:

Erstwhile delisting regulations provided for compulsory delisting. New regulations have also provided for compulsory delisting of equity shares. Compulsory delisting of the equity shares of the company shall be done by the stock exchange.

There is no change made in the process for the compulsory delisting of the equity shares of the company.
However, new regulations require for uploading of the order of compulsory delisting of the equity shares on the website of the stock exchange.

Determination of price:

After delisting process acquirer's shareholding should be minimum 90% of the company's shareholding. To achieve this threshold, a price is determined at which valuation of the shares accepted through eligible bids comes to at least 90% of the company's share capital. Such price is termed as 'Discovered Price ('DP')'.

Acquirer would be liable to buy shares at following prices in following conditions:

Conditions	Price at which acquirer is liable to buy
DP = FP	Floor Price ('FP')
FP < DP ≤ IP	Indicative Price ('IP')
DP > IP/FP	**If DP is accepted by acquirer:** Acquirer would be bound to buy shares at DP. **If DP is not accepted by acquirer:** Counter offer price can be offered by the acquirer but subject to following conditions: • Threshold of 90% should be achieved; and • Counter offer price should not be less than book value

"Floor Price ('FP')" means minimum price offered by the acquirer.
"Counter Offer Price" is price lower than discovered price and offered by the acquirer to the shareholders.

Authors' Note:

Delisting of equity shares has always been a sensitive and controversial issue. It is not only a structuring tool but also a possible corporate strategy to achieve greater control with less accountability to public (shareholders) at large. The recent economic slump has witnessed quite a few companies trying to delist, the low price of shares being a lucrative opportunity to increase control over the company.

Hence, the new regulations have eased the earlier complex procedure of voluntary delisting. The new regulations irrefutably address some core aspects and, address the various lacunae in the erstwhile regulations such as clarity on delisting timelines, delisting success thresholds and computation of book value in a counter-offer situation.

However, these new regulations require few more clarifications to serve the purpose of introduction of such new regulations better.

Public comments on the proposed changes to commentaries on Article 9 of the Model Tax Convention released by OECD

OECD on June 3, 2021 has released the public comments received from 20+ stakeholders on the proposed changes to the Commentaries on Article 9 (and related articles) of the OECD Model Tax Convention, invited on March 29, 2021 as a part of its ongoing work of OECD/G20 Inclusive Framework on BEPS.

OECD clarifies that the comments received shall be considered by Working Party 1 in the finalisation of the changes to the commentaries on Article 9 and related articles of the OECD Model Tax Convention with the expectation that revised commentaries would be included in the next update of the OECD Model Convention.

Reference:

https://www.oecd.org/tax/treaties/public-comments-received-on-proposed-changes-to-commentaries-in-the-oecd-model-tax-convention-on-article-9-and-on-related-articles.htm

G7 leaders commit to reaching consensus on 15% global minimum tax and global agreement on equitable solution for taxing rights allocation

As a significant step towards building a fairer tax system fit for the 21st century and to reverse a 40 year old race to the bottom by raising more tax revenues to support investments and curb tax avoidance, the G7 leaders at their Carbis Bay Summit, have committed to achieve a fairer global tax by intending to reach consensus on: (i) global agreement on equitable solution for allocation of taxing rights and (ii) global minimum tax of at least 15% on a country-by-country basis through the G20/OECD inclusive framework at the July meet of G20 Finance Ministers and Central Bank Governors.

A communique had earlier been issued post the 2-day meeting of the G-7 Finance Ministers in London which stated that the G-7 countries were agreeing to reach an equitable solution on allocation of taxing rights, with market countries being awarded taxing rights on at-least 20% of profit exceeding a 10% margin for the largest & most profitable multinational enterprises.

The communique further provides for appropriate co-ordination between the application of the new international tax rules and the removal of all digital services taxes.

Reference:

https://www.consilium.europa.eu/en/press/press-releases/2021/06/13/2021-g7-leaders-communique/

Bombay HC's deadlock on Intermediary Services

Background:

Pursuant to the Budget of 1991 under the leadership of then Finance Minister, Dr. Manmohan Singh, the Government of India had opened up the economy for foreign investment, which led to the inevitable advent of Globalisation in India. Thereafter, various Multi-National Companies had set-up their businesses in India and some of them witnessed tremendous growth. Following suit, a number of organisations began their operations in India, which inter alia involved working with intermediaries.

In order to ensure that no Revenue is lost, the Government had introduced the concept of intermediary services with a view to tax cross-border transactions of services provided to persons situated outside India but performed within the territory of India. This concept was introduced in the Service Tax Regime.

Under the said law, the term 'intermediary service' had been defined as a broker, agent or any other person, who arranges or facilitates a provision of a service or a supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account.

GST Law

The definition of the term 'intermediary service' under GST has been borrowed mutatis mutandis from the Service Tax regime. Under the current GST regime, Section 2(13) of the IGST Act defines intermediary as 'a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons, but does not include a person who supplies such goods or services or both or securities on his own account'.

Further, Section 8(2) provides that where the location of supplier and place of supply are in the same state, such supply shall be considered to be an intra-state supply. Section 13(8) of the IGST Act provides that the place of supply for 'intermediary services' shall be the location of supplier of services. Therefore, by a deeming fiction, the Act classifies the export of intermediary transaction as an intra-state transaction exigible to tax. Thus, a person arranging and facilitating supplies between two persons is covered by the definition and not independent suppliers of such supplies.

In the previous year, the Gujarat HC in the case of Material Recycling Association of India Vs. Union of India **[2020-TIOL-1274 -HC-AHM-GST]** had held that Section 13(8) is not a deeming provision but a stipulation by the Act legislated by Parliament to consider the location of service provider of intermediary to be place of supply.

In a recent development, a division bench of the Bombay HC created a lot of stir by pronouncing dissenting judgements in the case of Dharmendra M Jani **[2021-TIOL-1326 -HC-MUM-GST]**. In this case, the moot question pertained to the constitutional validity of Intermediary service provisions. Briefly stated, the Petitioner, engaged in providing marketing and promotion services to the overseas customer, solicited orders for the customer from Indian buyers. Thereafter, the Indian buyers would directly place orders on overseas seller, import goods on its own account. Meaning, the role of the Petitioner in the transaction would conclude post the soliciting of purchase orders from India buyers. The Petitioner would then raise invoices for its services on the overseas party and receive consideration in convertible foreign exchange.

As the above transaction is chargeable to IGST as per status quo,

the Petitioner had preferred a Writ before the Bombay HC challenging such levy of IGST. It was contended that such supply of service to overseas customer should qualify as export of service and not an intra-state supply. It was further contended that the intermediary service provisions u/s. 13(8)(b) and 8(2) of the IGST Act are ultra vires to various Articles of the Constitution of India.

Taking cognizance of the arguments put forth by the Petitioner, Justice Ujjal Bhuyan held that the intermediary service is undoubtedly an export of service and accordingly, read down the provision. On the other hand, Justice Ahuja, in his dissenting upheld the constitutional validity of the intermediary service provision. A summary of the observations by the both the judges have been tabulated hereunder:

Particulars	Justice Bhuyan's observations	Justice Ahuja's observations
Deeming Fiction under GST	By virtue of artificially creating a deeming provision in the form of section 13(8)(b) of the IGST Act, where the location of the recipient of service provided by an intermediary is outside India, the place of supply has been treated as the location of the supplier i.e., in India. This runs contrary to the scheme of the CGST Act as well as the IGST Act besides being beyond the charging sections of both the Acts.	In Section 8(2) the reference is to the same State in India, whereas in Section 13 (1) read with Section 13(8)(b) it is location of the service recipient being outside India. Once the Parliament has in its wisdom stipulated the place of supply in case of Intermediary Services be the location of the supplier of service, no fault can be found with the provision by artificially attempting to link it with another provision to demonstrate constitutional or legislative infraction;
Constitution Articles	Upon conjoint perusal of the Articles 246A and 269A, it was observed that the Constitution has only empowered Parliament to frame law for levy and collection of GST in the course of inter-state trade or commerce, besides laying down principles for determining place of supply and when such supply of goods or services or both takes place in the course of inter-state trade or commerce. Thus, the Constitution does not empower imposition of tax on 'export of services' out of the territory of India by treating the same as a local supply.	In terms of Article 286, no authority to any State to impose tax on intra state supply within another State except that other State. It does not permit any State in India to authorize imposition of tax on import into or export out of the territory of India of goods and services as that is the prerogative of the Central Government. Accordingly, the whole purpose of Article 286(2) is to empower the Parliament to formulate principles to determine the situs of supply, which is also stated in Article 269A;
Material Recycling Association of India Vs. Union of India	Judgement of Gujarat HC is not binding on Bombay HC	Agrees with the judgement of the Gujarat HC
Conclusive View	Intermediary Service provision under GST is ultra vires to the charging section of the CGST Act as well as to the Constitution of India	Intermediary Service provision is constitutionally valid

The Sparkle...

As can be seen from the above, both the judges have arrived to their respective conclusions formidably on the basis of well-reasoned judgements. It would be pertinent to note while Justice Bhuyan has held the intermediary provision to be unconstitutional, majority of the judgements and rulings in this regard remain pro-Revenue. The advance ruling authorities under GST have consistently held all marketing and advertising services provided outside India to be intermediary, without giving much reasons to it.

In Cliantha Research Limited **[2019-TIOL-183-AAR-GST]**, the Maharashtra AAR had held that if the goods are physically made available by the sponsor in India from some other place outside India, then place of supply of service will be considered as India and thus, such will not be considered as export of services. Similarly, in Toshniwal Brother (SR) Private Limited **[2019-TIOL-01-AAAR-GST]**, the Karnataka AAAR has held that promotion of products of any other person qualifies as intermediary services.

However, this does not mean that the judiciary has always been pro-Revenue in this regard. Under the erstwhile service tax regime, the New Delhi AAR in the case of GoDaddy India Web Services Private Limited **[2016-TIOL-08-ARA-ST]** had ruled that Place of Provision of Services Rules, does not include a person who provides main service on his own account. Where the applicant provides main service, i.e., business support services to a receiver abroad on his own account, does not qualify as an 'intermediary' and service provided by such person is not intermediary service.

It would be pertinent to note that under the GST regime as well, the CBIC, for a brief moment of time vide Circular No. 107/26/2019 – GST dated 18 July 2019 had clarified that where a supplier of ITES services supplies back-end services, does not fall under the ambit of intermediary u/s. 2(13) the IGST Act where these services are provided on his own account. Thereafter, owing to certain ambiguities, the CBIC vide Circular No. 127/46/2019 – GST dated 04 December 2019 withdrew the above-mentioned Circular ab initio.

TREATING EXPORTS EQUAL TO A LOCAL SUPPLY BY A DEEMING FICTION CREATES GENUINE HARDSHIPS FOR THE EXPORTERS AS IT SUBSTANTIALLY BLOCKS THEIR WORKING CAPITAL AND ADDS A COST TO THEIR SERVICES.

However, a clarification in this regard, is of utmost importance as treating exports equal to a local supply by a deeming fiction creates genuine hardships for the exporters as it substantially blocks their working capital and adds a cost to their services. What needs to be determined is whether such a deeming fiction can bring an otherwise untaxable supply under the tax net.

As for the deadlock in the instant judgement, arising out of contradictory views of both the judges, the matter has now been referred to the Chief Justice of the Bombay HC on the administrative side for his verdict. Until then, a clarification by the CBIC will go a long way in easing out difficulties of the trade and industry.

GLOSSARY

Abbreviation	Meaning	Abbreviation	Meaning
AAAR	Appellate Authority of Advanced Ruling	ITA	Interactive Tax Assistant
AAR	Authority of Advance Ruling	ITAT	Hon'ble Income Tax Appellate Tribunal
ACIT	Assistant Commissioner of Income Tax	ITC	Input Tax Credit
AE	Associated Enterprise	ITES	Information Technology Enabled Services
ALP	Arm's Length Price	MAT	Minimum Alternate Tax
AMP	Advertisement Marketing and Promotion	MRP	Maximum Retail Price
AO	Assessing Officer	NAA	National Anti-Profiteering Authority
APA	Advance Pricing Agreement	NCLAT	National Company Law Appallete Tribunal
APU	Authorized Public Undertaking	NCLT	National Company Law Tribunal
AY	Assessment Year	OECD	Organization for Economic Co-operation and Development
BEPS	Base Erosion and Profit Shifting		
CASS	Computer aided selection of cases for Scrutiny	PCIT	Principal Commissioner of Income Tax
CBDT	Central Board of Direct Taxes	PLI	Profit Level Indicator
CBEC	Central Board of Excise and Customs	R&D	Research and Development
CBIC	Central Board of Indirect Taxes and Customs	RFCTLARR Act	Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act
CENVAT	Central Value Added Tax		
CESTAT	Custom Excise and Service Tax Appellate Tribunal	RoDTEP	Remission of Duties and Taxes on Export of Products
CGST Act	Central Goods and Services Tax Act, 2017	SC	Hon'ble Supreme Court
CIRP	Corporate Insolvency Resolution Process	SCM	Subsidies and Countervailing Measures
CIT(A)	Commissioner of Income Tax (Appeal)	SCRR	Securities Contracts (Regulation) Rules, 1957
CLU	Changing Land Use	SLP	Special Leave Petition
CSD	Canteen Stores Department	TCS	Tax Collected at Source
CWF	Consumer Welfare Fund	TDS	Tax Deducted at Source
DCIT	Deputy Commissioner of Income Tax	The CP Act	The Consumer Protection Act, 2019
DGAP	Directorate General of Anti-Profiting	The IT Act/The Act	The Income-tax Act, 1961
DGFT	Directorate General of Foreign Trade	The IT Rules	The Income-tax Rules, 1962
DRP	Dispute Resolution Panel	TPO	Transfer Pricing Officer
Finance Act	The Finance Act, 1994	UN TP Manual	United Nations Practice Manual on Transfer Pricing
GST	Goods and Services Tax	VAT	Value Added Tax
HC	Hon'ble High Court	VSV	Vivad se Vishwas
IBC	International Business Corporation	NeAC	National e-Assessment Centre
IGST	Integrated Goods and Services Tax	The LT Act	The Limitation Act, 1963
IGST Act	Integrated Goods and Services Tax Act, 2017	CIRP	Corporate Insolvency Resolution Process
IRP	Invoice Registration Portal	MPS	Minimum Public Shareholding

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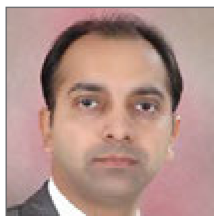
TCA's tax practice offers comprehensive services across both direct taxes (including transfer pricing and international tax) and indirect taxes (including GST, Customs, Trade Laws, Foreign Trade Policy and Central/States Incentive Schemes) covering the whole gamut of transactional, advisory and litigation work. TCA actively works in trade space entailing matters ranging from SCOMET advisory, BIS certifications, FSSAI regulations and the like. TCA (through its Partners) has also successfully represented umpteen industry associations/trade bodies before the Ministry of Finance, Ministry of Commerce and other Governmental bodies on numerous tax and trade policy matters affecting business operations, across sectors.

With a team of experienced and seasoned professionals and multiple offices across India, TCA offers a committed, trusted and long cherished professional relationship through cutting-edge ideas and solutions to its clients, across sectors.



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GST Legal Services LLP ('GLS') is a consortium of professionals offering services with seamless cross practice areas and top of the line expertise to its clients/business partners. Instituted in 2011 by eminent professionals from diverse fields, GLS has constantly evolved and adapted itself to the changing dynamics of business and clients requirements to offer comprehensive services across the entire spectrum of advisory, litigation, compliance and government advocacy (representation) requirements in the field of Goods and Service Tax, Customs Act, Foreign Trade, Income Tax, Transfer Pricing and Assurance Services.

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VMG & Associates ('VMG') is a multi-disciplinary consulting and tax firm. It brings unique experience amongst consulting firms with its partners having experience of Big 4 environment, big accounting, tax and law firms as coupled with significant industry experience. VMG offers comprehensive services across the entire spectrum of transaction support, business and risk advisory, financial reporting, corporate & allied laws, Direct & Indirect tax and trade related matters.

VMG has worked with a range of companies and have provided services in the field of business advisory such as corporate structuring, contract negotiation and setting up of special purpose vehicles to achieve business objectives. VMG is uniquely positioned to provide end to end solutions to start-ups companies where we offer a blend of services which includes compliances, planning as well as leadership support.

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